IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-5952

IN RE ESTATE OF SHERMAN GORDON,
Deceased,

DETA MONA TRIMBLE, and
JESSIE TRIMBLE,

APPELLANTS,

VS.

JOSEPH ROOSEVELT GORDON,
ETHEL MAE KING,
WILLIAM GORDON,
HELLIE MAE GORDEY,
and MARY LOIS GORDON,

APPELLEES.

ON APPEAL FROM THE
SUPREME COURT OF ILLINOIS

JURISDICTIONAL STATEMENT

Devereux Bowly
and
Charles Linn
Legal Assistance Foundation of Chicago
911 South Kedzie Avenue
Chicago, Illinois 60612
(312) 638-2343

James Weill
and
Jane G. Stevens
Legal Assistance Foundation of Chicago
343 South Dearborn Street
Chicago, Illinois 60604
(312) 341-1070

Attorneys for Appellants

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I N D E X

CITATIONS

CASES:

CONSTITUTIONAL PROVISIONS:

FEDERAL STATUTES:

STATE STATUTES:

MISCELLANEOUS:

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JURISDICTIONAL STATEMENT

Appellants appeal from the judgment of the Supreme Court of Illinois, entered on September 24, 1975, affirming the judgment of the Circuit Court of Cook County declaring DETA MONA TRIMBLE not the heir at law of her father SHERMAN GORDON,

and thus denying her any part of his estate, and submit this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented under the Fourteenth Amendment to the United States Constitution.

OPINION BELOW

The Illinois Supreme Court issued no written opinion in this cause. A copy of its official order is attached hereto as Appendix A. Attached as Appendix B is a certified transcript of the Illinois Supreme Court ruling from the bench, saying its decision here was based upon the case of In re Estate of Louis Karas, 61 Ill. 2d 40 (June 2, 1975). A copy of said decision is attached hereto as Appendix C. A copy of the order of court recalling and staying its mandate to the Circuit Court of Cook County, pending this appeal, is attached hereto as Appendix D.

JURISDICTION

The judgment of the Illinois Supreme Court was entered on September 24, 1975. A rehearing was not sought.

The jurisdiction of the Supreme Court to hear this appeal is conferred by Title 28, United States Code, Section 1257 (2). Levy v. Louisiana, 391 U.S. 68 (1968); Cohen v. California,

403 U.S. 15 (1971); and Winter v. People of State of New York, 333 U.S. 507 (1948).

THE STATUTE INVOLVED

The statute involved in this suit, Illinois Revised Statutes, Ch. 3, Sec. 12, final paragraph (which is the portion of the statute that relates to illegitimate children):

> An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents intermarry and who is acknowledged by the father as the father's child is legitimate.

QUESTIONS PRESENTED

1. Does Section 12 of the Illinois Probate Act invidiously discriminate both against and among illegitimate children, thereby denying them equal protection of the laws?

2. Does Section 12 of the Illinois Probate Act invidiously discriminate on the basis of sex, in violation of the Fourteenth Amendment to the United States Constitution?

STATEMENT OF THE CASE

This case involves the question of whether the illegitimate child of a man who died intestate is his heir for

inheritance purposes. Sherman Gordon, a 28 year old resident of Chicago, died May 23, 1974, leaving no will. He was the victim of a homicide. His estate consisted of a 1974 Plymouth automobile, having a value of approximately $2,500. He died leaving no spouse, and appellant Deta Mona Trimble, 3 years old at the time of death, as his only descendent.

Appellant Jessie Trimble is a 30 year old woman residing in Chicago. She and Sherman Gordon lived together with their child, Deta Mona Trimble, from 1970 until his death, but they never inter-married. On January 2, 1973, the Circuit Court of Cook County, Illinois, entered an order, in the case of Jessie Trimble v. Sherman Gordon, 72 MC1 - J846169, finding said Sherman Gordon to be the father of Deta Mona Trimble, and ordering him to pay $15 per week for her support. Sherman Gordon in his day-to-day activities publicly acknowledged Deta Mona Trimble as his child, and supported her pursuant to the said paternity order.

On July 25, 1974, Deta Mona Trimble, by her mother and next friend, Jessie Trimble, filed a Petition for Letters of Administration, Determination of Heirship and Declaratory Relief in the Circuit Court of Cook County, Illinois. That court heard arguments as to the unconstitutionality of Illinois Revised Statutes, Ch. 3, Sec. 12, as it applies to illegitimate children, and also heard evidence as

to the heirs of decedent Sherman Gordon.

On September 9, 1974, the court entered the Order Declaring Heirship, which provided that the only heirs of Sherman Gordon are his father, mother, brother, two sisters, and half-brother. In so doing it was held that Deta Mona Trimble was not the heir at law of Sherman Gordon. An appeal was taken from that order. The Illinois Supreme Court entered an order allowing direct appeal, thus bypassing the Illinois Appellate Court. The Illinois Supreme Court also granted leave to appellants to file an Amicus Brief in the case of In Re Estate of Louis Karas, which was then pending before the court. In that case, and its companion case, In re Estate of Robert Woods, illegitimate children whose fathers had died intestate challenged on constitutional grounds the same statute that is challenged herein.

On June 2, 1975, the Illinois Supreme Court issued its opinion in In re Estate of Louis Karas, 61 Ill.2d 40 (1975) upholding the statute and rejecting all arguments of its unconstitutionality, including the arguments made in our Amicus Brief. A copy of said decision is attached hereto as Appendix C. On September 24, 1975, oral argument was held in the instant case before the Illinois Supreme Court, and Chief Justice Underwood orally delivered the

opinion of the court from the bench saying the trial court judgment was affirmed, based upon the Karas holding. A certified transcript of his remarks is attached hereto as Appendix B. On October 15, 1975, the court issued its written order, effective September 24, 1975, affirming the trial court. A copy of that order is attached hereto as Appendix A. It is from the order dated September 24, 1975, issued October 15, 1975, that this appeal is taken. On October 21, 1975, Justice Daniel P. Ward of the Illinois Supreme Court signed an order recalling and staying the mandate issued to the Circuit Court of Cook County on October 15, 1975, pending resolution of this appeal. A copy of that order is attached hereto as Appendix D. Also attached hereto, as Appendix E, is the Notice of Appeal, which was filed on November 17, 1975.

THE QUESTIONS PRESENTED ARE SUBSTANTIAL

Appellant Deta Mona Trimble has been denied any right to inherit her father's estate, solely on the basis of her status of birth. Section 12 of the Illinois Probate Act declares that illegitimate children may inherit from and through their mothers, but may not inherit at all from or through their fathers.[1] Instead, her father's collateral

[1] Ill.Rev.Stat., Chapter 3, Sec. 12, as construed by In re Estate of Karas, 61 Ill.2d 40 (1975).

relatives have been declared his sole heirs at law. Had her parents been married at the time of her birth, or had she been subsequently legitimated, appellant Deta Mona Trimble, as decedent's only child, would have inherited his entire estate.[2] The Illinois statute at issue thus discriminates both against and among illegitimate children. It classifies children on the basis of their status at birth, discriminating against those who are illegitimate, and further, by sub-classification among illegitimate children based on the sex of the decedent parent. One sub-class of illegitimate children, those who survive the death of the mother, inherit from the intestate parent, while those surviving the father's death are excluded from any intestate succession. These classifications deny appellant Deta Mona Trimble equal protection of the laws as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

In upholding the constitutionality of Section 12 of the Illinois Probate Act, the Illinois Supreme Court relied exclusively on the decision of this Court in Labine v. Vincent, 401 U.S. 532 (1971). Labine, however, upheld complex provisions of the Louisiana Civil Code defining the rights of legitimate and illegitimate children. These provisions are not only substantially different from those at issue here;

[2] Ill.Rev. Stat., Chapter 3, Sec. 11.

they are, in fact, unique. No jurisdiction other than Louisiana limits the right of an illegitimate child to inherit from this mother, nor does any other jurisdiction require acknowledgment for an illegitimate child to have any right to inherit from his mother.[3] Louisiana is also unique in that it specifically provides for support for all illegitimate children, even those barred from any inheritance rights, and even from the estate of either parent.[4]

The statutes of twenty-one states, in addition to Illinois, explicitly, by implication, or by judicial construction, deny illegitimate children the right to inherit from an intestate father, while providing for inheritance from an intestate mother.[5] The other 28 states, with the exception of Louisiana, provide for inheritance by an illegitimate child from the estate of an intestate father. The law of twenty-one states, then, is identical to that of Illinois.

[3] Louisiana Civil Code, Articles 202, 206, 918-920.

[4] Louisiana Civil Code, Articles 240-242.

[5] Alabama Code, tit.16 §7; Ark.Stats.Ann.§61-103; D.C. Code §19-316; Ga.Code Ann, §113-904; Hawaii Rev.Stat. §§532-7, 577-14; Ky.Rev.Stat. §391.090; Mass. Gen.Laws, Ch.190 §5; Miss.Code, §91-1-15; Missouri (Vernon's) Ann.Stat. §§474.060, 474.070; N.H. Rev.Stat. Ann. §561-4; N.J. Stat. Ann.tit.3A §4-7; Okla.Stat. Ann.tit. 84 §215; Pa.Cons. Stat. tit. 20 §2107; R.I. Gen.Law, §33-1-8; S.C. Code §19-53; Tenn. Code Ann. §§31-107, 31-205; Tex.Stats, Prob. §42; Va. Code §§64.1-5, 64.1-6; W. Va.Code, §§42-1-5, 42-1-6; Wyo.Stats. §2-44. Although Connecticut statutory law is silent on the subject, by judicial construction illegitimate children can inherit through the mother, but not from their fathers. See Dickinson's Appeal, 42 Conn.491(1875); Heath v. White, 5 Conn.228 (1824).

The Illinois Supreme Court, then, has applied the decision of this Court in Labine, a decision based on a statutory scheme which is unique, to a statutory scheme identical to that of twenty-one states. In so doing, however, the court not only ignored major factual distinctions between the Louisiana statutory scheme upheld in Labine and the statute here in question; it also broadened the scope and effect of the Labine decision in the face of clear indications from this Court which limit the impact and meaning of Labine to its particular context.

The reasoning, if not the holding, of Labine has been undermined by several more recent decisions of this Court,[6] and lower courts have had great difficulty in reconciling these decisions.[7] To resolve these conflicts, as well as to decide the constitutionality of a statutory scheme adopted by twenty-one states, this Court should give this appeal plenary consideration.

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[6] E.g., Jimenez v. Weinberger, 417 U.S. 628 (1974); Gomez v. Perez, 409 U.S. 532 (1973) and Weber v. Aetna Casualty Company, 406 U.S. 164 (1972).

[7] See, e.g., Eskra v. Morton, 380 F.Supp. 205 (W.D.Wisc. 1974) reversed ____ F.2d ____, (7th Cir. No. 74-1906, Sept. 29, 1975); Norton v. Weinberger, 364 F.Supp. 117 (D. Md.1973), vac. and remanded, 418 U.S. 902 (1974), (on remand) 390 F.Supp. 1084 (D. Md. 1975), juris.postponed to hearing on merits, ___U.S.___, 95 S. Ct. 2676, 45 L. Ed. 2d 707 (1975); Lucas v. Secretary, Department of Health, Education and Welfare, 390 F.Supp.1310 (D.R.I. 1975) prob. juris. noted, ____U.S.____, 46 L. Ed. 2d 36 (1975); Green v. Woodard, 40 Ohio App.2d 101 (Ohio Ct. of Appeals, Cuyahoga County, 1974).

I. THE ILLINOIS PROBATE ACT DISCRIMINATES BOTH AGAINST AND AMONG ILLEGITIMATE CHILDREN, THEREBY DENYING THEM EQUAL PROTECTION OF THE LAWS.

A. THE LABINE DECISION IS INAPPLICABLE TO STATUTORY CLASSIFICATIONS WHICH DISCRIMINATE BOTH AGAINST AND AMONG ILLEGITIMATE CHILDREN; LABINE IS ALSO INAPPLICABLE TO PROBATE CODES WHICH FAIL TO PROVIDE FOR SUPPORT FOR ILLEGITIMATE CHILDREN.

In recent years this Court has repeatedly invalidated on equal protection grounds discrimination against illegitimate children or sub-groups of illegitimate children. Jimenez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Griffin v. Richardson, 346 F.Supp. 1226 (D. MD. 1972), aff'd 409 U.S. 1069 (1972); Davis v. Richardson, 342 F.Supp. 588 (D. Conn., 1972), aff'd 409 U.S. 1069 (1972); Gomez v. Perez, 409 U.S. 532 (1973); Weber v. Aetna Casualty Company, 406 U.S. 164 (1972); Glona v. American Guarantee and Liability Insurance Company, 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968). As concisely stated in Gomez v. Perez, 409 U.S. 532, 538 (1973), "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." (Empahsis added). This Court has stated in the strongest possible terms the utter irrationality of archaic discrimination against illegitimate children:

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bounds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual --as well as an unjust--way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by those hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to statutus of birth alone--where as in this case--the classification is justified by no legitimate state interest--compelling or otherwise. Weber v. Aetna Casualty Company, 406 U.S. 164, 175-6 (1972).

There is nothing in these opinions which sanctions arbitrary discrimination against illegitimate children, much less the additionally capricious discriminations among illegitimate children created by the statute at issue here.

The Illinois Supreme Court relied solely on Labine v. Vincent, 401 U.S. 532 (1971) in denying appellants' claim. In doing so the Court ignored the substantial differences between the Louisiana statute at issue in Labine and the Illinois scheme at issue here.

In Labine v. Vincent, supra, this Court upheld the constitutionality of certain provisions of the Louisiana Civil Code. In Louisiana, illegitimate children are divided

into two classes, "natural children" who must be acknowledged and whose parents must have been capable of marrying at the time of their conception, and "bastards," who are defined as all unacknowledged illegitimate children and those whose parents were incapable of contracting marriage at the time of their conception.[8] The latter class is barred from inheriting from either parent,[9] while "natural children" are granted limited rights of succession to the estate of either parent.[10] Louisiana also specifically provides for support payments, in the form of "alimony," for all illegitimate minor children, from either parent, and from the estate of either parent,[11] even where the parent dies intestate.

Illinois, in contrast, has no such consistent scheme. This is shown in crucial differences between the Illinois scheme and the Louisiana statute. First, instead of limiting the right of an illegitimate child to inherit from either parent, Illinois not only discriminates against illegitimate children as opposed to legitimate children, but also irrationally discriminates among illegitimate children by creating sub-classes based on the sex of the surviving parent. The Illinois Probate Act mandates that illegitimate children inherit from

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[8] Louisiana Civil Code, Article 202.

[9] Louisiana Civil Code, Article 920

[10] Louisiana Civil Code, Articles 918-919. These sections provide that a "natural child" inherits from his mother if she leaves no others descendants and dies intestate, and inherits from his father if he dies intestate and leaves no other heirs-at-law.

[11] Louisiana Civil Code, Articles 240-42.

their mothers in the same manner as do legitimate children. Illegitimate children who survive the death of their fathers, however, are absolutely barred from intestate succession. This exclusion applies whether or not the father formally acknowledged them, supported them, or had been found, in a paternity action, to be their father.

Second, Illinois has no specific provision allowing illegitimate children support from the estate of a decedent parent. In Louisiana, on the other hand, illegitimate children received some form of protection. "Natural children," as discussed earlier, had limited rights in intestacy. Both "natural children" and the other group of illegitimate children, "bastards," had a right to claim support against the heirs-at-law including legitimate children. La.Civ. Code Ann., Art. 240. Both the plurality opinion (401 U.S. at 533) and Justice Harlan's concurring opinion (401 U.S. at 540) noted this support right. An illegitimate child in Illinois, on the other hand, is left unprotected after the death of his father, even where, as here, the father had acknowledged and was supporting the child pursuant to court order, and had no spouse or legitimate children. Clearly "illegitimate children [are being denied] substantial benefits accorded children generally," Gomez v. Perez, 409 U.S. at 538, in a scheme substantially different from, and more arbitrary and pernicious than the Louisiana

statute which granted some rights to all illegitimate children.[12]

The Illinois exclusion of illegitimate children is not only substantially different from the Louisiana statutory partial inclusion of illegitimate children, but also is more representative of those state statutes which discriminate against illegitimate children. It is therefore appropriate for this Court to grant plenary review of the Illinois discrimination.

B. THE DECISION OF THIS COURT IN JIMENEZ V. WEINBERGER, IS MORE CLOSELY ANALOGOUS THAN THE DECISION IN LABINE.

In Jimenez v. Weinberger, 417 U.S. 628, (1974), this Court struck down a provision of the Social Security Act which prohibited illegitimate children, born after the onset of their father's disability, from receiving Social Security benefits. What is crucial in this context is that the Jimenez children were actually barred from benefits by the operation of Ill.Rev.Stat., Ch. 3, Sec. 12, the statute contested here. As this Court noted:

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[12] In this and other contexts this Court has not favored total exclusions of children from statutory coverage, while taking a more lenient view in cases involving the relative quality and level of inclusions. Compare, e.g., Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Jimenez v. Weinberger, 417 U.S. 620 (1974); N.J.W.R.O. v. Cahill, 411 U.S. 619(1973); Davis v. Richardson, 342 F.Supp. 588 (D. Conn.1972), aff'd 409 U.S. 1069 (1972); and Griffin v. Richardson, 346 F.Supp. 1226 (D. Md. 1972) aff'd 409 U.S. 1069 (1972) with Dandridge v. Williams, 397 U.S. 471 (1971). See also Labine, 401 U.S. at 535-536, distinguishing Levy v. Louisiana, 391 U.S. 68 (1968): "Under those circumstances the Court [in Levy] held that the State could not totally exclude from the class of potential plaintiffs illegitimate children..." (Emphasis added).

> Since the parents never married, appellants are classified as illegitimate children under Illinois law and are unable to inherit from their father because they are non-legitimated illegitimate children. Ill.Ann.Stat., Ch. 4, §12 (sic).
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> The contested Social Security scheme provides, in essence, that legitimate or legitimated children (42 U.S.C. §402 (d)(3)), illegitimate children who can inherit their parent's personal property under the intestacy laws of the State of the insured's domicile (42 U.S.C. §416 (h)(2) (A))... are entitled to receive benefits without any further showing of parental support. However, illegitimate children such as Eugenio and Alicia...who do not fall into one of the foregoing categories, are not entitled to receive any benefits. Jiminez,417 U.S. at 630, 631 n.2 (Emphasis supplied).

In other words, in Jimenez the statutory bar at issue here had been incorporated into federal law and used as a bar to Social Security benefits.

The particular discrimination made in the Illinois Probate Act renders Jimenez, not Labine, analogous here. While Labine dealt with distinctions between legitimate and illegitimate children, Jimenez grappled with the present scheme, creating discrimination not only against illegitimate children, but also among various sub-classes of illegitimates. The Court found the Social Security Act effectively incorporated the statute at issue here in violation of equal protection guarantees. The complete statutory bar imposed on some illegitimates because they could not inherit in intestacy was found to have no rational basis.[13]

[13] See also Eskra v. Morton, ___F.2d___(7th Cir.No.74-1906, September 29, 1975), invalidating a federal statutory denial of inheritance rights to an illegitimate child based on a Wisconsin statute analogous to the statute contested here.

The Illinois statute at issue here not only was the basis of the Social Security Act provision struck down in Jimenez, but is similarly structured to discriminate among illegitimate children as well as against them. Illegitimates are sub-classified based on the sex of the decedent mother. Intestate succession rights equivalent to those of legitimate children are granted illegitimate children of decedent mothers, but denied to children of decedent fathers. This is the type of sub-classification of illegitimate children, mixed with an intent to discriminate against illegitimate children, condemned as irrational in Jimenez.

C. THIS COURT SHOULD RESOLVE THE APPARENT CONFLICT BETWEEN THE REASONING, IF NOT THE HOLDING, OF LABINE AND THE MEANING OF SUBSEQUENT DECISIONS.

Since 1968 this Court has considered the constitutionality of various statutory classifications based on legitimacy of birth no less than nine times;[14] of these decisions, only Labine found the classification capable of withstanding an attack on equal protection grounds. While this result may be explained by reference to the unique Louisiana statutory scheme considered therein, difficulty has arisen since the broader implications of that decision

[14] Jimenez v. Weinberger, 417 U.S. 628 (1974); New Jersey Welfare Rights Organization v. Cahill, 411 U.S. 619 (1973); Griffin v. Richardson, 346 F.Supp.1226 (D.MD. 1972), aff'd 409 U.S. 1069 (1972); Davis v. Richardson, 342 F.Supp. 588 (D.Conn., 1972), aff'd 409 U.S. 1069 (1972); Gomez v. Perez, 409 U.S.532 (1973); Weber v. Aetna Casualty Company, 406 U.S. 164 (1972); Labine v. Vincent 401 U.S. 532 (1971); Glona v. American Guarantee and Liability Insurance Company, 391 U.S. 73 (1968); Levy v. Louisiana, 391 U.S. 68 (1968).

have subsequently been repudiated by this Court. Lower courts, in measuring various schemes which excluded illegitimate children, including exclusions from intestacy statutes, have had great difficulty in grappling with the test applied and the result achieved in Labine, as modified and contradicted by later decisions of this Court:

> Later decisions appear to have eroded the vitality of the majority's opinion in Labine and indicate that the minority view of the four dissenting judges is more in line with the Court's current stance. Norton v. Weinberger, 364 F.Supp. 1117, 1124 (D.Md 1973), vacated and remanded on other gds., 418 U.S. 902 (1974) (on remand) 390 F.Supp. 1084 (D.Md. 1975), jurisdiction postponed to hearing on merits, ___U.S. ____, 95 S.Ct. 2676, 45L.Ed. 2d 707 (1975).

And, as stated in Eskra v. Morton, 380 F.Supp. 205, 214-215 (W.D. Wis. 1974), reversed on other gds. _____F2d_____(7th Cir.No. 74-1906, September 29, 1975):

> I am reluctant to accept a reading of Labine which would leave the state legislatures free to perform this peculiar function [regulating intestate succession] utterly uninhibited in this reluctance by the language of the opinion in Weber...
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> I consider that I may treat as an aberration the process of decision actually engaged in by the Court in Labine, and that Weber, and many other decisions of the Court in non-illegitimacy cases in recent years require [a different judgmental process].

Other Courts have had similar problems in coming to grips

with Labine.[15] This confusion has derived from the inability to reconcile Labine with later decisions in several respects.

First, it must be noted that the Court in Labine suggested an unusual standard of scrutiny. Traditionally, statutory classifications have been subjected to "minimal scrutiny," a test which requires that the classification "bear some rational relationship to legitimate state purposes."[16] Confronted with classifications which either impinge upon "fundamental interests" or which create a "suspect class," however, this Court has applied the "strict scrutiny" test, by which the classification must be justified by a "compelling governmental interest," and must achieve that purpose only by the least drastic means.[17] There may also be an intermediate level of scrutiny, used, for example, in cases involving sex discrimination, by which the classification must bear a "fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."[18]

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[15] See, e.g., Beaty v. Weinberger, 478 F.2d 300 (5th Cir.1973), aff'd 418 U.S. 901 (1974), Watts v. Veneman, 334 F.Supp. 482 (D.D.C. 1971), aff'd in part, rev'd in part on other grounds, 476 F.2d 529 (D.C. Cir. 1973); Severance v. Weinberger, 362 F.Supp. 1348 (D.D.C. 1973) Lucas v. Secretary, Department of Health, Education and Welfare, 390 F.Supp. 1310 (D.R.I.1975) prob. juris.noted ___U.S.____, 46 L.Ed. 2d 36 (1975); Jimenez v. Weinberger 353 F.Supp. 1356 (N.D. Ill.1973), rev'd 417 U.S. 628 (1974); Green v. Woodard 40 Ohio App.2d 101, 318 N.E.2d 397 (Ohio Ct. of Appeals, Cuyahoga County, 1974).

[16] San Antonio School District v. Rodrigue[illegible], 411 U.S.1,40(1973)

[17] Id., at 16-17. See also Police Department of Chicago v. Mosley, 408 U.S. 92 (1972); Dunn v. Blumstein, 405 U.S. 330 (1972); Shapiro v. Thompson, 394 U.S. 618 (1969); Loving v. Virginia, 388 U.S. 1 (1967); In re Griffith, 413 U.S. 717 (1973); and Oyama v. California 332 U.S. 633(1948).

[18] Reed v. Reed, 404 U.S. 71, 75-76. (citation omitted).(1971).

In the Labine decision, however, this Court suggested a standard of review less exacting than any of these formulations: "the power to make rules to establish, protect and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State."[19] As noted by several lower courts since, as well as by the four dissenters in Labine, this assertion implies that the power of the states to regulate such matters is somehow exempt from even the minimal scrutiny reserved for other legislation. This implication is strengthened by the Court's comment that "even if we were to apply the rational basis test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State." Labine at 536 n.6. If the Court was not applying the "rational basis" test in Labine it is difficult to imagine what level of scrutiny was applied. This Court has never, before or since the decision in Labine, articulated a standard of review less exacting than the "rational basis" test. Any such implication in Labine, moreover, is directly contradicted by the subsequent decisions of this Court in illegitimacy cases. While the Court has, as yet, found it unnecessary to apply the "strict scrutiny" test to classifications based on illegitimacy,[20] it has consistently applied at

[19] Labine v. Vincent, 401 U.S. 532, 538 (1971).

[20] Jimenez v. Weinberger, 417 U.S. 628, 631-32 (1974).

least minimal scrutiny to such classifications.

Any implication from Labine that discrimination against illegitimate children in a statute regulating the disposition of decedents property need not be scrutinized was apparently abandoned shortly afterwards in Reed v. Reed, 404 U.S. 71 (1971) and Weber v. Aetna Casualty Company, 406 U.S. 164 (1972). In Reed this Court examined an Idaho state law established to regulate the disposition of a decedent's property and found sex discrimination in such a law not to bear a "fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." 404 U.S. at 75-76.

Weber v. Aetna Casualty Company, 406 U.S. 164 (1972), as noted in Eskra and Norton, supra, also abandons any suggestion that Labine insulates state intestacy laws discriminating against illegitimate children from equal protection guarantees. Weber offers an explicit enunciation of this Court's deep-rooted concern to protect the rights of illegitimate children. Although the Court found it unnecessary to apply a "strict scrutiny" test, the majority did note the existence of both catalysts, either of which independently triggers strict scrutiny. After noting that the classification affected "fundamental interests,"[21] the Court went on to condemn

[21] "Though the latitude given state economic and social legislation is necessarily broad, when state statutory classifications approach sensitive and fundamental personal rights, this Court exercises a stricter scrutiny." Weber, 406 U.S. 164, 172.

classifications based on legitimacy for many of the same reasons offered by this Court to justify characterizing a class as "suspect:"

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bounds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual--as well as an unjust--way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by those hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth alone--where as in this case--the classification is justified by no legitimate state interest--compelling or otherwise.[22]

For both reasons, then, because the classification in Weber approached a "suspect class" and because it approached

[22] Weber, 406 U.S. 164, 175-6. Compare with Frontiero v. Richardson, 411 U.S. 677 (1973), where four justices explained the reason for holding sex to be a "suspect class," citing Weber:
> Moreover, since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility..." Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175-6 (1972). And what differentiates sex from such non-suspect statutes as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. Id., at 686

"fundamental interests," the Court cited the absence of a "significant" connection between classification and statutory purpose as the basis for its holding the statute unconstitutional. 406 U.S. at 175. This "significant" relationship test is similar to the test used by this Court in Reed v. Reed, supra, and clearly involves heightened concern for illegitimate children.

Indeed, a strong argument can be made that this Court should adopt the "strict Scrutiny" test for all classifications based on illegitimacy. This Court has repeatedly defined "suspect classes" in terms of society's treatment of them:

> The system of alleged discrimination and the class it defines have none of the traditional indicia of suspectness: the class is not saddled with disabilities or subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political processes. Rodriguez, 411 U.S. at 29. See also, Graham v. Richardson, 403 U.S. 365 (1971) and United States v. Carolene Products Co., 304 U.S. 144, 153 n.4 (1938).

That illegitimate children as a class are a discrete and insular minority cannot be seriously contested. Illegitimate children in 1970 comprised only 10.10% of total U.S. births.[23] The class has fared poorly at the hands of the

[23] U.S. Bureau of Census, Statistical Abstract of the United States: 1974 (95th edition), Washington, D.C. p. 56.

majoritarian processes. The effect of society's condemnation of innocent children can only be described as perverse.[24] In fact, one sociologist has concluded that illegitimate children have a lower mean "I.Q." than do legitimate children of the same race and similar economic status. Moreover, the study found that the difference increased as the children grew older, and concluded that the difference was the result of the child's increasing awareness of his socially inferior status.[25] The effect of governmental and societal discrimination against illegitimate children, then, is stigmatizing and invidious; it deprives innocent children of an equal opportunity to develop intellectually and emotionally. In order to insure that illegitimate children receive an equal opportunity to develop their minds, this Court should declare that all classifications based on illegitimacy are "suspect."[26]

Even if this Court rejects the notion that classifications based on illegitimacy are "suspect," however, recent decisions do make it clear that such classifications must be given more

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[24] "To give the illegitimate child an inferior status because, through no fault of his own, his parents were never joined in an easily dissolved union is a hypocrisy which can only frustrate and alienate him from the society which created his inferiority." Marcus "Equal Protection: The Custody of the Illegitimate child," 11 Journal of Family Law 1, 17-18 (1971).

[25] Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children," 64 American Journal of Sociology 196 (1958).

[26] cf., Brown v. Board of Education, 347 U.S. 483 (1954).

than minimal scrutiny. Nevertheless, until this Court expressly rejects the implication in Labine that such classifications need not be scrutinized carefully, lower courts may continue to misconstrue the test to be applied to classifications based on status of birth. Plenary consideration of this appeal, then, is necessary in order to settle the apparent conflict between the standard of review adopted in Labine and that articulated in Reed, supra, Weber, supra, Gomez, supra, and Jimenez, supra.

Subsequent decisions of this Court have also undermined the other rationales offered by the Labine majority. In Labine itself this Court placed primary emphasis on the state interest in preserving and promoting family life, yet in Weber v. Aetna Casualty Company, supra, only one year later, this Court abandoned the "family life" rationale so strongly relied upon in Labine, rejecting in unmistakably strong language the validity of the rationale when offered to support the discrimination against illegitimate children contained in the Louisiana Workman's Compensation Statute. The language in Labine equating illegitimate children and "concubines" (401 U.S. at 538) has been abandoned as this Court has recognized that stigmatizing and penalizing the child is an ineffective way of deterring the parent and promoting family life. Weber, 406 U.S. at 175-6; Jimenez, 417 U.S. at 632.

This Court has also, since Labine, undermined any explanation of that case based on the state interest in the prompt and definitive determination of the valid ownership of property left by decedents. In Gomez v. Perez, 409 U.S. 532 (1972), the Court struck down a statute which prohibited illegitimate children from obtaining support from their fathers in spite of a recognition of the state's valid interest in preventing spurious claims. Recognizing the difficulty of proof which is inherent in paternity actions, the Court nevertheless held that such difficulties may not"... be made into an impenetrable barrier that works to shield otherwise invidious discrimination." 409 U.S. at 538. The assertion in Labine that allowing illegitimate children to inherit from intestate decedents would prevent prompt and definitive determinations of the ownership of property is attributable to the occasional difficulty of establishing paternity. This concern was decisively rejected in Gomez. See also Weber, 406 U.S. at 174, Jimenez, Griffin, Davis, supra, Stanley v. Illinois, 405 U.S. 645 (1972). They make clear that the Court is not unmindful that illegitimacy presents difficult problems of proof of paternity, and that the Court will respect the state or federal government's method of determining the genuineness of individual claims. But they also unequivocally establish that once paternity is established, the constitution requires

that all children--whether legitimate or illegitimate--be treated equally. Moreover, in all these cases, all proof problems evaporate where, as here, there has been a formal and definitive devolution of property, a state certainly cannot discriminate between legitimate children and illegitimate children who have been acknowledged.

Finally, there is the possible Labine rationale based on the suggestion that the decedent could have legitimated a child or written a will. 401 U.S. at 539. From the point of view of the child discriminated against, it really makes no difference whether such options were non-existent or simply not exercised.[27] This Court made it clear in Weber that an illegitimate child cannot be penalized for the action/inaction of his parent. 406 U.S. at 175-176. As recently stated in Eskra v. Morton, _____F.2d _____(7th Cir.no. 74-1906),(September 29, 1975) (Slip opinion p.7):

> In our judgment, the presumed intent of intestate decedents in an unacceptable justification for a decision by the state which the state would otherwise be unable to justify. It is unacceptable, not because it is irrational to assume that there are a significant number of private citizens who would intentionally punish children for the transgressions of their parents, but rather because such motivation on the part of the state is offensive to our concept of due process. In some communities it would be unrealistic to assume that most decedents would discriminate in favor of, or against, members of a particular religious sect, race, political party, or

[27] Similarly in Reed v. Reed, 404 U.S. 71 (1971), the statutory preference to the male in issuing letters of administration of a person dying intestate could easily have been altered by a writing of a will by a decedent.

> perhaps even sex. But surely the state may not, for that reason alone, make comparable discriminatory choices. Just as private schools or private hospitals may place some arbitrary limits on the classes of people they will serve, so may testators make irrational choices in the distribution of their property. But when the choice is made by the government, the obligation to afford all persons equal protection of the laws arises.

A review of cases from Weber through Jimenez, then, reveals that both the standard of review articulated in Labine and the rationales offered therein to support the classification of children by legitimacy of birth in Louisiana's Probate Code have been repudiated, at least by implication, by this Court. The decision of the Illinois Supreme Court in this case, however, expands Labine by applying it to an entirely different statutory scheme. To correct this error and to resolve the apparent conflicts between Labine and subsequent decisions, conflicts which have caused significant problems in lower courts, this Court should give this appeal plenary consideration.

II. THE ILLINOIS PROBATE ACT INVIDIOUSLY DISCRIMINATES AGAINST APPELLANTS ON THE BASIS OF SEX IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellants here have also been harmed by the discrimination on the basis of sex embodied in Section 12 of the Illinois Probate Act. Under Illinois law, both the father and mother of a child, including an illegitimate child,

have a duty to support the child, e.g. Ill. Rev.Stat., Ch. 23, Sec. 10-2; Ill.Rev.Stat., Ch. 68, Sec. 24; Ill.Rev. Stat., Ch. 106 3/4, Sec. 52. When one parent dies, the surviving parent obviously retains the duty of support and maintenance of the child as a legal matter, and as a practical matter, the burden of that legal duty becomes greater because it is no longer shared. Yet, despite the clear economic disadvantage of surviving mothers (compared to surviving fathers) as discussed below, existing law gives preference to and assistance in meeting the support obligation to the surviving father. This discrimination on the basis of sex violates the equal protection rights of both the mother and the children, as established by Weinberger v. Weisenfeld, 420 U.S. 636 (1975).

The statute accomplishes this discrimination by providing that when the mother of the illegitimate child dies intestate, the illegitimate child is the "heir of his mother." Ill.Rev.Stat., Ch.3, Sec. 12. The father, as the surviving parent, is, therefore directly assisted in his support obligations by the fact that the child is legally entitled to money from the estate of the intestate mother. When the father of an illegitimate child dies intestate, on the other hand, the child is barred from sharing the estate.

The child's mother, his sole surviving parent, is therefore burdened with the far more onerous task of supporting a child who has no claim against his father's estate, requiring her to replace the support previously provided by the father. The statute therefore discriminates against women by failing to provide for their children a legal right of inheritance equivalent to that granted to the children of surviving male parents.[28]

The negative impact of this statute on women, intertwined with the general economic disadvantage suffered by women, renders it particularly offensive. Recently, this Court upheld a tax preference given to widows but not widowers, stating:

> There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other state exceed those facing the man. Whether from overt discrimination or from the socialization process of a dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs.
>
> ***
>
> We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden. Kahn v. Shevin, 416 U.S. 251 (1974).

There can be little doubt that the outcome in Kahn would have been different if widowers had been a preferred group. But here, in an analogous situation, the statute is

[28] In Labine, on the other hand, as noted earlier, the illegitimate child had a right to support from the estate of either parent.

doing the opposite of what was approved in Kahn. Section 12 of the Illinois Probate Act aggravates, rather than cushions, the financial impact of the death upon the sex for whom the loss imposes a disproportionately heavy burden. As noted in Kahn, even when women are able to enter the work force, they are paid proportionately less than their male counterparts. Female parents left with dependent children after the death of the father are in greater need of financial help in fulfilling their responsibility to support their children than would be men in the same situation. And yet, the staturoty scheme challenged here disadvantages women and assists men who are otherwise identically situated.

Most recently, in Weinberger v. Weisenfeld, this Court invalidated a Social Security Act scheme which discriminated on the basis of sex in the provision of benefits to the surviving parent. 420 U.S. 636 (1975). In Weisenfeld the Social Security Act, based on the earnings of a deceased husband and father, would grant benefits both to the widow and the couple's minor children. Based on the earnings of a deceased wife and mother, however, no benefits would go to the widower. The Court invalidated this sex discrimination. "The gender-based distinction of 42 U.S.C. Sec.402(g) is entirely irrational. The classification discriminates among surviving children solely on the basis of the sex of the surviving parent." 420 U.S. at 651. Here the classification discriminates against illegitimate children, against women, and among

surviving illegitimate children based solely on the sex of the surviving parent.

This is completely irrational. In addition, although a majority of this Court has yet to declare that discrimination on the basis of sex is suspect, several recent decisions do indicate that more than minimal scrutiny must be given such classifications.[29] Whether this Court applies the more than minimal scrutiny of the "fair and substantial relationship" test of Reed v. Reed 404 U.S. 71, (1971), or the strict scrutiny applied by four justices in Frontiero v. Richardson, 411 U.S. 677 (1973), or the traditional test, Section 12 of the Illinois Probate Act must fail, as it furthers no substantial legitimate governmental interest, compelling or otherwise. As discussed earlier, the discrimination does not protect the prompt and definitive disposition of property, particularly where the decedent has acknowledged paternity or has been adjudicated to be the father. Nor does it strengthen family ties. Instead of insuring that direct descendants have priority, the statute precludes illegitimate children from inheriting from intestate fathers, establishing a preference for collateral relatives to the exclusion of a man's natural children. Nor can the statute be based on the presumed intent of the decedent.

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[29] See, e.g., Weinberger v. Weisenfeld, 420 U.S. 636 (1975); Reed v. Reed, 404 U.S. 71 (1971) and Frontiero v. Richardson, 411 U.S. 677 (1973).

In conclusion, there exists a preference in the statute in favor of surviving fathers and children and against surviving mothers and illegitimate children. The fathers are assisted in their obligation of support by the child's ability to inherit from the deceased mother's estate. The surviving mothers, on the other hand, despite other economic disadvantages, receive no equivalent assistance in meeting their legal obligations to support the child. The arbitrary and invidious discrimination against the children and the parent based on the sex of the surviving parent contravenes the purposes of the statute, is not justified by any legitimate governmental interest, and is completely analogous to the irrational scheme invalidated in Weisenfeld, supra. Moreover, in Reed, supra, this Court established that discrimination on the basis of sex in statutes governing intestate succession violates the Fourteenth Amendment.

This question was not presented in Labine. The Illinois statute at issue here, moreover, is far more representative than the Louisiana statute or those remaining archaic state schemes which bar some illegitimate children from inheriting in intestacy. The amalgram of discrimination against and among illegitimates with a veneer of discrimination on the basis of sex cannot withstand the scrutiny imposed on such classifications from Weber through Weisenfeld.

CONCLUSION

For the reasons set forth above, jurisdiction should be noted.

Respectfully submitted,

Devereux Bowly

One of the Attorneys for Appellants

Devereux Bowly
and
Charles A. Linn
Legal Assistance Foundation of Chicago
911 South Kedzie Avenue
Chicago, Illinois 60612
(312) 638-2343

James Weill
and
Jane G. Stevens
Legal Assistance Foundation of Chicago
343 South Dearborn Street
Chicago, Illinois 60604
(312) 341-1070

Attorneys for Appellants

APPENDICES

United States of America

State of Illinois } ss.
Supreme Court

At a Term of the Supreme Court, *begun and held in Springfield, on Monday, the* eighth *day of* September *in the year of our Lord, one thousand nine hundred and* seventy-five *, within and for the State of Illinois.*

PRESENT: ROBERT C. UNDERWOOD, CHIEF JUSTICE

JUSTICE WALTER V. SCHAEFER — JUSTICE THOMAS E. KLUCZYNSKI

JUSTICE DANIEL P. WARD — JUSTICE CHARLES H. DAVIS

JUSTICE JOSEPH H. GOLDENHERSH — JUSTICE HOWARD C. RYAN

WILLIAM J. SCOTT, ATTORNEY GENERAL

WILLIAM G. LYONS, MARSHAL

ATTEST: CLELL L. WOODS, CLERK

Be It Remembered, *that, to-wit: on the* 24th *day of* September *19* 75, *the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:*

Deta Mona Trimble and Jessie Trimble,

Appellants

No. 47339 vs.

Joseph Roosevelt Gordon, Ethel Mae King, William Gordon, Hellie Mae Gordey, and Mary Lois Gordon,

Appellees

Appeal from
Circuit Court
Cook County
74 P 5002

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment *aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.*

THEREFORE, it is considered by the Court that the judgment of the Circuit Court of Cook County *aforesaid, BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said* appellees *recover of and from the said* appellants *costs by* them *in this behalf expended, to be taxed, and that* they *have execution therefor.*

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, *I have hereunto subscribed my name and affixed the Seal of said court this* 15th *day of* October *, 19* 75.

(S E A L)

/s/ Clell L. Woods,

Clerk,

Supreme Court of the State of Illinois.

APPENDIX A

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
) SS.
SUPREME COURT)

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the following remarks were made by CHIEF JUSTICE UNDERWOOD at the end of the oral argument on September 24, 1975, in case No. 47339 - Deta Mona Trimble, et al., appellants, vs. Joseph Roosevelt Gordon, et al., appellees:

"CHIEF JUSTICE UNDERWOOD: Counsel, I think it will not be necessary to hear further argument. The Court has concluded that Karas is dispositive of the matter and it is the judgment of the Court that the judgment of the circuit court of Cook County is affirmed."

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 19th day of November, A.D. 1975.

Clell. Woods

Clerk,
Supreme Court of the State of Illinois.

APPENDIX B

(Nos. 46986, 47092 cons.–Judgments affirmed.)

In re ESTATE OF LOUIS KARAS.–(Mary Sodermark, Appellant, v. Evangelia Karas, Appellee.)–*In re* ESTATE OF ROBERT WOODS.–(Margaret Marie Collins, Appellant, v. Addie Wheeler, Adm'r, Appellee.)

Opinion filed June 2, 1975.

1. PROBATE–*the regulation of the descent of property, including the inheritance rights of illegitimates, is within the control of the legislature.* The regulation of the descent of property and of the right to devise property is entirely within the control of the legislature, and expansion of inheritance rights of an illegitimate child in the estate of the father who dies intestate must be left to legislative modification. (P. 45.)

2. CONSTITUTIONAL LAW–*burden of proof as to validity of classification.* Under traditional concepts of Federal equal protection, a legislative classification will be upheld if it bears a rational relationship to a valid governmental purpose, and the burden of rebutting the presumptive validity of the classification rests upon the party challenging its constitutionality; but when the classification affects fundamental rights or involves a "suspect classification" the burden is placed upon the State to demonstrate that the distinction is justified by a compelling governmental interest. (Pp. 46-47.)

3. SAME–*a statute is not racially discriminatory merely because at a given time one racial group is more affected by it than another–inheritance by illegitimates.* A statute containing no racial classification is not racially discriminatory merely because the bare statistical possibility exists that at any given time it could incidentally tend to affect to a greater extent a particular racial group within the general class to which the statute is applicable, as where a statute precludes illegitimate children from inheriting from their intestate father and petitioner claims that statistics indicate that an excessively disproportionate share of illegitimate children are born to blacks and other minorities. (P. 50.)

4. SAME–*classifications based on sex or illegitimacy are not "suspect classifications" requiring a compelling governmental interest under the Federal equal protection clause.* A majority of the United States Supreme Court has never held that classifications based on sex or illegitimacy are "suspect classifications" that require the showing of a compelling governmental interest to support them. (Pp. 50-51.)

APPENDIX C

5. PROBATE–*the State has an interest in prohibiting spurious claims against an estate–inheritance by illegitimates.* The State has an interest in prohibiting spurious claims against an estate, and proof of paternal relationship may not be so readily ascertainable as proof of maternal ancestry, and these factors may be cited to uphold a legislative classification permitting illegitimate children to inherit from the mother who dies intestate while precluding them from inheriting from the father who dies intestate. (Pp. 51-52.)

6. CONSTITUTIONAL LAW–*the Supreme Court's interpretation of the Federal equal protection clause governs the State courts.* A State may not impose restrictions respecting equal protection of the laws as a matter of Federal constitutional law when the United States Supreme Court has specifically refrained from imposing them. (P. 53.)

7. SAME–*right to object to discrimination on account of sex is limited to those affected as a result of their own sex–inheritance by illegitimates.* Section 18 of article I of the 1970 Illinois Constitution guarantees that "equal protection of the laws shall not be denied or abridged on account of sex ***," but objections to classifications based on sex may be raised only by individuals who are affected as a result of their own sex, and not by those alleging sexual discrimination against others from which they claim to be damaged, as where a child objects to a State statute permitting illegitimates to inherit from the mother who dies intestate but not from the intestate father. (Pp. 53-54.)

8. PROBATE–*sections 9 and 11 of the Probate Act were not intended to create a statutory scheme for financial support–inheritance by illegitimates.* In a suit attacking the constitutionality of a statute permitting illegitimate children to inherit from a mother who dies intestate but not from the intestate father, it cannot be successfully contended that the statute discriminates against the surviving mother because her illegitimate child, in such case, will not inherit from its father, for sections 9 and 11 of the Probate Act were not intended to create a statutory scheme for financial support, and those who inherit under the Act do so irrespective of their financial statuts. (Pp. 55-56.)

9. CONSTITUTIONAL LAW–*trial court need not conduct hearing on paternity requested by illegitimate child of intestate decedent–due process.* An illegitimate child who may not, because of statute, inherit from its intestate father is not deprived of due process of law by the trial court's refusal to establish whether the decedent was the child's father. (P. 56.)

10. PROBATE—*an illegitimate child who cannot inherit from the intestate father may not act as administrator of his estate.* An illegitimate child who cannot, by reason of statute, inherit from its intestate father should not be allowed to act as administrator of his estate. (P. 56.)

No. 46986.—Appeal from the Appellate Court for the First District; heard in that court on appeal from the Circuit Court of Cook County; the Hon. John J. Hogan, Judge, presiding.

James R. Phelps and Wayne R. Andersen, of Burditt and Calkins, of Chicago, for appellant.

Gerald W. Shea, of Berwyn (Robert J. Lifton, of Neistein, Richman, Hauslinger & Young, Ltd., of Chicago, of counsel), for appellee.

No. 47092.—Appeal from the Circuit Court of Cook County; the Hon. John J. Hogan, Judge, presiding.

Mary Reardon Hooton, of Chicago, for appellant.

Schwartzberg, Barnett & Schwartzberg, Goodman, Krasner & Kipnis, and Zaidenberg, Hoffman & Schoenfeld, all of Chicago (Benjamin H. Cohen and Hugh J. Schwartzberg, of counsel), for appellee.

Devereux Bowly and Charles Linn, Legal Assistance Foundation of Chicago, and James Weill and Jane Stevens, Legal Assistance Foundation, all of Chicago (John Henry Schlegel, of Buffalo, New York, and Joseph Bomba (law student), of counsel), for *amici curiae* Deta Mona Trimble and Jessie Trimble.

MR. JUSTICE KLUCZYNSKI delivered the opinion of the court:

These consolidated appeals present the common issue of whether an acknowledged illegitimate child may inherit from her father who died intestate never having married the child's mother. A subsidiary issue involves the right of

an illegitimate to be appointed the administrator of the estate under these circumstances.

The relevant sections of the Probate Act read as follows:

"Sec. 12. Illegitimates.

* * *

An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents intermarry and who is acknowledged by the father as the father's child is legitimate." Ill. Rev. Stat. 1973, ch. 3, par. 12.

"Sec. 96. Persons entitled to preference in obtaining letters.) The following persons are entitled to preference in the following order in obtaining the issuance of letters of administration ***:

* * *

(2) The children or any person nominated by them." Ill. Rev. Stat. 1973, ch. 3, par. 96.

In cause No. 46986 Louis Karas died intestate. The circuit court of Cook County entered an order declaring Evangelia Karas, his widow, to be his only heir-at-law. Thereafter Mary Sodermark, petitioner, sought to vacate the order of heirship claiming that she was the child of Louis Karas and Estelle Ross, who never married. The Sodermark petition alleged that Estelle Ross had been institutionalized for psychiatric reasons and apparently upon her release had disappeared. The petition further averred that Mary Sodermark had been acknowledged as the child of Louis Karas and that he had contributed to her support while she lived with an aunt. The petition asserted that Louis Karas and his wife, Evangelia, lived for a time with Mary Sodermark, her husband and family and that Louis Karas had contributed a downpayment to the purchase of the Sodermark's house. The circuit court granted Evangelia's motion to strike and dismiss the

Sodermark petition. The appellate court affirmed (*In re Estate of Karas*, 21 Ill. App. 3d 564), and we granted leave to appeal.

In cause No. 47092 Robert Woods died intestate at the age of 81. He left no surviving spouse and no legitimate children or descendants thereof. The circuit court of Cook County determined that there existed certain collateral heirs-at-law of the deceased. Margaret Marie Collins, petitioner, then attempted to obtain letters of administration and a declaration of heirship on her behalf. She asserted in her petition that she was the acknowledged illegitimate daughter of the deceased and a lawful heir to his $37,000 estate. The circuit court sustained the motion of certain collateral heirs-at-law to strike and dismiss the Collins' petition, and we granted direct appeal (50 Ill.2d R. 302(b)).

We have permitted the filing of an *amicus* brief in these consolidated cases. The *amicus* has pending in this court a direct appeal involving similar issues. (*In re Estate of Gordon*, No. 47339.) The illegitimate in *Gordon* is a minor. *Amicus* asserts that prior to the death of the unmarried father there had been a judicial order adjudicating paternity and ordering that he support this child.

As accepted by the motions to strike and dismiss the petitions, for the purpose of these appeals Mary Sodermark and Margaret Marie Collins are the acknowledged illegitimate children of the respective decedents, who never married the natural mothers. (*Gertz v. Campbell* (1973), 55 Ill.2d 84, 87.) Thus they have not been legitimatized in accord with section 12 of the Probate Act, and under prior case law (*Krupp v. Sackwitz* (1961), 30 Ill. App. 2d 450, *appeal denied*, 21 Ill.2d 621) are not considered heirs of their fathers, who died intestate.

At common law an illegitimate could not inherit. (*Blacklaws v. Milne* (1876), 82 Ill. 505, 506.) By statute the result of this rule was ameliorated. (Ill. Ann. Stat., ch. 3, sec. 12, Historical Note, at 64 (Smith-Hurd 1961); see

also 2 Horner, Probate Practice and Estates, secs. 1348, 1350-51 (4th ed. 1960).) In *Smith v. Garber* (1918), 286 Ill. 67, the court, in discussing the predecessor provisions of section 12 of the Probate Act, stated:

> " 'Sections 2 and 3 of our Statute of Descent were enacted for the purpose of obviating the undue severity of the common law and of erecting a rule more consonant with justice to an innocent and unfortunate class. Section 2 *** abrogates the common law rule that an illegitimate is the child of nobody and could not take property by inheritance, even from its own mother.' (*Robinson v. Ruprecht*, 191 Ill. 424.)
>
> Under the common law an illegitimate was considered *filius nullius*. (1 Blackstone's Com. *459.) Under the statutes passed in this State in relation to illegitimate children, 'an illegitimate person is recognized as the child of his mother, as regards the descent of property.' (*Miller v. Williams*, 66 Ill. 91.) In *Bales v. Elder*, 118 Ill. 436, this court said that it was the purpose of the legislature in enacting the statute as to illegitimate children, to remove the common law disability of inheritance and place them more nearly on a level with legitimates. (See, also, *Jenkins v. Drane*, 121 Ill. 217; *Chambers v. Chambers*, 249 id. 126.) In *Robinson v. Ruprecht, supra*, this court said (p. 433): 'The rule [of the common law] visited the sins of the parents upon the unoffending offspring, and could not long survive the truer sense of justice and broader sense of charity that came with the advancing enlightenment and civilization of the race.' " 286 Ill. 67, 70-71.

It is argued in the Sodermark appeal that this court modify the common law rule that an acknowledged illegitimate may not be an heir of the intestate father's estate. She urges that she be allowed to inherit to the

extent of a legitimate child. This is not a tenable argument.

For nearly 150 years this State by statute has mitigated the effect of the common law rule prohibiting inheritance by illegitimates. While discussing other Probate Act provisions, this court has held that "The regulation of the descent of property and of the right to devise property as well as the method of conveying and the manner of creating estates and the character and quality of estates created, is purely statutory and entirely within the control of the legislature. [Citations.] Being wholly statutory the rules of descent may be changed by the legislature in its discretion, and conditions or burdens may be imposed upon the right of succession." (*Steinhagen v. Trull* (1926), 320 Ill. 382, 387; see also *Jahnke v. Selle* (1938), 368 Ill. 268, 271.) Moreover, *Miller v. Pennington* (1905), 218 Ill. 220, involved litigation contesting certain property of the intestate decedent. He had fathered two illegitimate sons by a woman whom he subsequently married. The question presented concerned whether these sons could be deemed to be legitimatized and could therefore share as heirs-at-law with the other legitimate children of the father. The descent statute, considered by the court (Hurd's Stat. 1899, ch. 39, sec. 3) in determining whether these sons had been legitimatized, is presently incorp rated within section 12 of the Probate Act. The court there held that the rights of the sons who had been born illegitimate were to be determined under the pertinent provision of the descent statute. The aforegoing authorities support the conclusion that expansion of inheritance rights of an illegitimate child in the estate of the father who dies intestate must be left to legislative modification. Therefore consideration of the applicability of the common law to intestate succession is of no relevance. *Campbell v. McLain* (1925), 318 Ill. 610, 612-13.

Petitioners and *amicus* urge that the statutory scheme which precludes the inheritance by an acknowledged illegitimate from the estate of the intestate father violates

the Federal and State constitutional provisions guaranteeing equal protection and due process of law. In so arguing petitioners and *amicus* recognize the possible adverse implications of the United States Supreme Court decision in *Labine v. Vincent* (1971), 401 U.S. 532, 28 L. Ed. 2d 288, 91 S. Ct. 1017.

In *Labine v. Vincent* the acknowledged illegitimate child had been precluded under Louisiana law from inheriting on an equal basis with legitimate children, if the father died intestate. It was argued that this statutory limitation was contrary to Federally secured rights to equal protection and due process. In a 5-to-4 decision the Supreme Court rejected these claims, stating that "the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules." (401 U.S. 532, 537, 28 L. Ed. 2d 288, 293, 91 S. Ct. 1017, 1020.) The Supreme Court further concluded that Louisiana's intestate succession laws had not created "an insurmountable barrier" to the acknowledged illegitimate child inheriting from the father. Alternatives existed, such as the execution of a will or marriage to the child's mother, which would have obviated the bar to the inheritance. As later explained, *Labine v. Vincent* "reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders. *** The Court has long afforded broad scope to state discretion in this area." *Weber v. Aetna Casualty & Surety Co.* (1972), 406 U.S. 164, 170, 31 L. Ed. 2d 768, 776, 92 S. Ct. 1400.

Under traditional concepts of Federal equal protection a legislative classification will be upheld if it bears a rational relationship to a valid governmental purpose, and the burden of rebutting the presumptive validity of the

classification rests upon the party challenging its constitutionality. (*People v. Sherman* (1974), 57 Ill.2d 1, 4.) When the classification, however, affects fundamental rights (see *Hoskins v. Walker* (1974), 57 Ill.2d 503, 508) or involves a "suspect classification" (*People v. Ellis* (1974), 57 Ill.2d 127, 131), the burden is placed upon the State to demonstrate that the distinction is justified by a compelling governmental interest.

Petitioners and *amicus* expend much effort in attempting to refute the present application of *Labine v. Vincent*. They maintain that the rational bases suggested in that opinion to justify the classification cannot be applied in these cases. They also urge that other Supreme Court decisions have eroded the validity of that decision.

The Supreme Court noted that Louisiana's intestate succession scheme was rationally based on its interests to encourage family relationships and to establish a method of property disposition. (*Labine v. Vincent*, 401 U.S. 532, 536 n.6, 28 L. Ed. 2d 288, 292 n.6, 91 S. Ct. 1017, 1019 n.6.) Petitioners and *amicus* argue that Illinois statutes fail to disclose this State's interest in the promotion of family relationships as did the Louisiana statutes. We cannot accept this hypothesis. And we do not believe that Illinois has any lesser interest than Louisiana in regulating the transfer of a decedent's property in its jurisdiction. It is our opinion that petitioners and *amicus* have failed to detract from the impact of *Labine v. Vincent* in these regards.

Several Supreme Court decisions have been cited whose thrust is said to have severely lessened the present vitality of *Labine v. Vincent*. Petitioners and *amicus* cite *Levy v. Louisiana* (1968), 391 U.S. 68, 20 L. Ed. 2d 436, 88 S. Ct. 1509, which invalidated a State law precluding illegitimate children from seeking a recovery for the wrongful death of their mother when such an action could be maintained by legitimate children, and *Glona v. American Guarantee & Liability Insurance Co.* (1968), 391 U.S. 73, 20 L. Ed. 2d 441, 88 S. Ct. 1515, which nullified a statute that had been construed as prohibiting the mother of an illegitimate child from maintaining an action for his wrongful death. The Supreme Court, however, expressly found that the rationale of its prior decisions in *Levy* and *Glona* did not extend to the situation presented in *Labine v. Vincent*, 401 U.S. 532, 535, 28 L. Ed. 2d 288, 292, 91 S. Ct. 1017, 1019. Petitioners and *amicus* further cite *Weber v. Aetna Casualty & Surety Co.* (1972), 406 U.S. 164, 31 L. Ed. 2d 768, 92 S. Ct. 1400, which held that a dependent unacknowledged illegitimate child could not be deprived of workmen's compensation benefits accruing to dependent legitimate children as a result of the death of the natural father; *Gomez v. Perez* (1973), 409 U.S. 535, 35 L. Ed. 2d 56, 93 S. Ct. 872, which precluded a State from denying relief to an illegitimate child seeking support from his natural father when such relief was afforded to a legitimate child; *New Jersey Welfare Rights Organization v. Cahill* (1973), 411 U.S. 619, 36 L. Ed. 2d 543, 93 S. Ct. 1700, which voided certain statutory provisions of a State-aid program to poor families limiting benefits to married couples with minor children, thereby, in effect, denying benefits to illegitimate children; and *Jimenez v. Weinberger* (1974), 417 U.S. 628, 41 L. Ed. 2d 363, 94 S. Ct. 2496, which held unconstitutional a statutory program denying benefits to illegitimate children born after the onset of the parent's disability, while permitting benefits to illegitimate children who were similarly born, if the latter group of children could inherit under State intestacy laws, could be legitimated under State law or were considered illegitimate only as a result of a formal defect in their parents' marriage.

We have examined these decisions and do not find the constitutional impact of *Labine v. Vincent* to have been lessened. As previously set forth, *Weber v. Aetna Casualty & Surety Co.* explained *Labine v. Vincent*, and expressed no dissatisfaction with that decision.

In asserting that the present Illinois classification of illegitimates is violative of Federal constitutional principles, petitioners and *amicus* recommend that this court apply the stricter equal protection test which would require the State to justify the classification by a compelling governmental interest. It is claimed that the present classification is racially and sexually discriminatory and that illegitimacy is itself a suspect classification, thereby necessitating application of the stricter constitutional standard.

In support of the position that the statutory framework is racially discriminatory, petitioner in cause No. 47092 sets forth various statistical sources which she says indicate that an excessively disproportionate share of illegitimate children were born to blacks and other minorities as compared to Caucasians. In light of these statistics this petitioner concludes that section 12 of the Probate Act has evolved to the extent that it "fits into a pattern of legislation which often is only a thinly disguised cover for racial discrimination." A comparable claim of racial discrimination, predicated on similar statistics, was presented by the *amicus* in *Labine v. Vincent* with no apparent success. Moreover, section 12 of the Probate Act does not contain any racial classification and affects all members of the class of illegitimates without regard to racial heritage. Such a statute, without more, would not appear in and of itself to substantiate a claim that it is racially discriminatory merely because the bare statistical possibility exists that at any given time it could incidentally tend to affect to a greater extent a particular racial group within the general class. The alleged deprivation of which petitioner complains is remedied through the simple expedient of testamentary disposition by means of a will. And no claim is advanced that any racial group is restricted in any judicially cognizable manner from utilizing this procedure.

The argument that section 12 sexually discriminates

so as to give rise to a stricter approach to Federal equal protection principles is also unpersuasive. We are cognizant of the recent decision wherein the Supreme Court struck down a Social Security provision which had precluded survivor's benefits to an unemployed widower who remained at home to care for his minor child, while permitting such payments to a similarly situated widow. The court there held that this classification was not rational under the statute's intended purpose. (*Weinberger v. Wiesenfeld* (1975), ––– U.S. –––, 43 L. Ed. 2d 514, 95 S. Ct. 1225.) However, while the claim is made that a classification by sex requires a more stringent application of equal protection principles, we find that only four members of the Supreme Court have accepted this position. (*Frontiero v. Richardson* (1973), 411 U.S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (plurality opinion); see also *Stanton v. Stanton* (1975), ––– U.S. –––, 43 L. Ed. 2d 688, 95 S. Ct. 1373; *Schlesinger v. Ballard* (1975), ––– U.S. –––, 42 L. Ed. 2d 610, 95 S. Ct. 572 (Brennan, J., dissenting); *Kahn v. Shevin* (1974), 416 U.S. 351, 40 L. Ed. 2d 189, 94 S. Ct. 1734 (Brennan, J., dissenting).) We are unwilling to decide that all classifications based upon sex require that the State establish a compelling governmental interest under the Federal equal protection clause.

No decision has been cited in which a classification based on illegitimacy has been expressly held to be a suspect classification. Rather the decisions concerning illegitimacy previously set forth would seem to have been determined on whether or not the classification could be said to be predicated on a rational basis. In *Jimenez v. Weinberger* (1974), 417 U.S. 628, 41 L. Ed. 2d 363, 94 S. Ct. 2496, the Supreme Court stated it need not reach the argument as to whether a stricter equal protection standard was applicable in order to determine the validity of a classification premised on illegitimacy. Moreover, the *amicus* brief filed in *Labine v. Vincent* suggests the

argument was advanced that stricter equal protection principles be utilized when examining a classification based on illegitimacy. Thus for several of the comparable reasons expressed in our discussion of the issues regarding alleged race and sex discrimination stemming from application of section 12 of the Probate Act, we are unable to presently conclude that a classification based on illegitimacy is a suspect classification under Federal constitutional interpretation.

The precise issue set forth in *Labine v. Vincent* is present in these appeals, *i.e.*, can an acknowledged illegitimate be treated differently than a legitimate child and thereby, in effect, be precluded from sharing in its father's estate by State laws governing intestate succession. In each of these specific appeals no "insurmountable barrier" to Mary Sodermark and Margaret Marie Collins sharing in their fathers' estates has been created. In both instances the deceased fathers apparently lived for a substantial number of years. Since Louis Karas was survived by his spouse, he could have devised as much as two thirds of his estate to Mary Sodermark. (Ill. Rev. Stat. 1973, ch. 3, par. 16; see *Montgomery v. Michaels* (1973), 54 Ill.2d 532, 534-5.) Because Robert Woods had no surviving spouse, he could have left his entire estate to Margaret Marie Collins if he had utilized the simple formalities of a will.

We further recognize that the State maintains an interest in prohibiting spurious claims against an estate. The parties to these appeals tend to agree that proof of a lineal relationship is more readily ascertainable when dealing with maternal ancestors. It is suggested that proof of paternal relationship may not be so readily ascertainable but that such considerations should be decided individually on the facts of each case. While establishing paternity in a proceeding to determine heirship is possible, situations may arise which are fraught with fraudulent circumstances. There exists the possibility that an illegitimate "grandson" may seek to inherit from his "grandfather" who dies not only intestate but also after the death of his own son and without knowledge of the existence of the illegitimate. Similar circumstances might also arise in which illegitimates, claiming a collateral relationship, would seek rights to the estates of paternal intestate kindred. (See generally *Gregory v. County of LaSalle* (1968), 91 Ill. App. 2d 290.) There also may be situations in which a "father's" testamentary disposition is challenged on behalf of an illegitimate child who was born after the will was executed, thereby possibly permitting the child to recover a share of the estate equivalent to that allowed if the "father" had died intestate. Ill. Rev. Stat. 1973, ch. 3, par. 48; 2 Horner, Probate Practice and Estates sec. 1331 (4th ed. 1960).

In summary, to accept the numerous arguments raised by petitioners and *amicus* in regard to Federal equal protection principles would result in this court's placing strictures on *Labine v. Vincent*. "But, of course, a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court [United States Supreme Court] specifically refrains from imposing them." (Emphasis in original.) *Oregon v. Haas* (1975), --- U.S. ---, ---, 43 L. Ed. 2d 570, 576, 95 S. Ct. 1215, 1219.

There remains the contention that section 12 of the Probate Act is unconstitutional because it violates State constitutional guarantees that "equal protection of the laws shall not be denied or abridged on account of sex ***." (Ill. Const. (1970), art. I, sec. 18.) In *People v. Ellis* (1974), 57 Ill.2d 127, 132-33, we construed this provision as rendering any classification based on sex to be a "suspect classification," thus subjecting it to "strict judicial scrutiny" and requiring the existence of a compelling State interest to justify the classification. See also *Phelps v. Bing* (1974), 58 Ill.2d 32.

Petitioner in cause No. 47092 first claims that section

12(4) of the Probate Act discriminates against the father and his descendants when his illegitimate child dies intestate leaving no spouse or descendants. If this situation occurs, petitioner says the father and his descendants are precluded from sharing in the child's estate while the mother and her descendants may share in the estate. A comparable attack is made upon sections 12(5) to 12(7), which generally concern inheritance from the estate of an illegitimate by maternal kindred while omitting consideration of paternal kindred. Petitioner also maintains that section 12 requires a mother to draw a will in order to disinherit her children while a father of an illegitimate child, who is not legitimized by the procedures of section 12, need not do so. Conversely, if the father of the illegitimate wishes the illegitimate child to share in his estate he must execute a will, whereas the mother need not resort to this course of action. Finally, petitioner argues that she is injured by limiting her inheritance to the estate of her mother who dies intestate or her maternal ancestors and by precluding her inheritance from her father or his ancestors. She claims that she should either inherit from both or inherit from neither, and she concludes that as a result of section 12 of the Probate Act she is injured by the sexual discrimination against each of her parents.

No contention is asserted that section 12 of the Probate Act results in any sexual discrimination as between similarly situated males and females who seek inheritance from the estates of their fathers or other paternal kindred. Under section 12 no discrimination inures to an illegitimate as a result of the illegitimate's sex. The question therefore presented in whether under these circumstances one may assert a claim of discrimination based upon the sex of another person pursuant to section 18 of article I of the State Constitution.

In our decisions of *Ellis* and *Bing* the individuals were treated differently on the basis of their sex because of classifications in the Juvenile Court Act and Marriage Act.

Neither case involved a situation wherein the affected individuals asserted a constitutional deprivation based solely on the sex of another person, as in these appeals. The official explanation of section 18 of article I recites that "no government in Illinois may deny equal protection of the law to anyone because of his or her sex." (7 Record of Proceedings, Sixth Illinois Constitutional Convention 2688.) This explication indicates that State constitutional issues raising questions of classifications based on sexual differentiation may be raised by individuals who are thereby affected as a result of their own sex. For this reason, we are of the opinion that petitioner's State constitutional claim is without merit.

Amicus argues that both parents have a duty to support a child and if one parent dies the survivor's duty is necessarily increased. *Amicus* says that section 12 invidiously discriminates against the surviving mother in preference to the surviving father of the illegitimate child. It is argued that the father is aided in his obligation of support because the child may inherit from the mother. Conversely, they argue, the mother is not aided and, in fact, is burdened, for the child cannot inherit from the father and support from the father is no longer available. *Amicus* concludes that section 12 "discriminates against women by failing to provide for their children a legal right of inheritance equivalent to that granted to the children of surviving male parents." To buttress this argument *amicus* refers only to sections 9 and 11 of the Probate Act (ch. 3, pars. 9 and 11), which *amicus* asserts are designed to prevent a decedent's closest relatives from becoming wards of the State.

We have examined these provisions and are unable to interpret these sections as intending to create a statutory scheme for financial support. Section 9, in pertinent part, merely says that the Probate Act shall be liberally construed. Section 11 establishes an intestate succession for the devolution of property not involving illegitimates.

There is no basis evident from the language employed in either section which permits an interpretation that these provisions were intended to alleviate the possibility that certain close relatives of the decedent would seek public assistance. Obviously the application of section 11 provides the basis wherein certain relatives may assure their living standard or even elevate it by their inheritance. But this provision also allows inheritance to wealthy relations to the exclusion of impoverished individuals who may be only slightly more remote in their relationship to the decedent. Moreover, relations of equal degree similarly inherit even though there may exist extreme divergence in their financial status.

Having concluded that the petitioners were not denied equal protection of the law, we do not find that they were deprived of due process of law by the trial courts' refusals to permit a hearing wherein they might seek to establish the paternity of the decedents. *Cf. Stanley v. Illinois* (1972), 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208.

There remains the contention advanced by petitioner in cause No. 47092 that she has a preference in issuance of letters of administration as set forth in section 96(2) of the Probate Act (ch. 3, par. 96(2)). In determining that petitioner may not inherit from her father under the circumstances presented in this case, we do not believe it logical that she should be allowed to participate in the administration of his estate. See *Myatt v. Myatt* (1867), 44 Ill. 473, 476.

Accordingly, the judgment of the appellate court in cause No. 46986 is affirmed. The judgment of the circuit court of Cook County in cause No. 47092 is affirmed.

Judgments affirmed.

IN THE
SUPREME COURT OF ILLINOIS

IN RE ESTATE OF SHERMAN GORDON,
Deceased,

DETA MONA TRIMBLE, and
JESSIE TRIMBLE,
PETITIONERS-
APPELLANTS,

_VS_

JOSEPH ROOSEVELT GORDON,
ETHEL MAE KING,
WILLIAM GORDON,
HELLIE MAE GORDEY,
and MARY LOIS GORDON,
RESPONDENTS-
APPELLEES.

NO. 47339

O R D E R

This matter coming before the court on the motion of DETA MONA TRIMBLE and JESSIE TRIMBLE, Petitioners-Appellants herein, it is hereby ordered that the mandate of this court, issued to the Clerk of the Circuit Court of Cook County on October 15, 1975, be and is hereby recalled and stayed, pending resolution of the petitioners' application for review of the judgment herein by the Supreme Court of the United States, which application will be promptly made (DSW)

Daniel P. Ward

DATED: Oct 21-75

Devereux Bowly and Charles Linn
Attorneys for Petitioners-Appellants
Legal Assistance Foundation of Chicago
911 S. Kedzie Avenue
Chicago, IL 60612
638-2343

APPENDIX D

IN THE
SUPREME COURT OF ILLINOIS

IN RE ESTATE OF SHERMAN GORDON, Deceased,	)
DETA MONA TRIMBLE, and JESSIE TRIMBLE, PETITIONERS-APPELLANTS,	)
VS.	)
JOSEPH ROOSEVELT GORDON, ETHEL MAE KING, WILLIAM GORDON, HELLIE MAE GORDEY, and MARY LOIS GORDON, RESPONDENTS-APPELLEES.	) NO. 47339

NOTICE OF APPEAL

Appellants, DETA MONA TRIMBLE and JESSIE TRIMBLE, appeal to the Supreme Court of the United States from the final judgment of this court entered September 24, 1975, affirming the judgment of the Circuit Court of Cook County declaring DETA MONA TRIMBLE not the heir at law of SHERMAN GORDON, and thus denying her any part of his estate.

This appeal is taken pursuant to 28 U.S.C. §1257(2). The basis of the decision against appellants was Illinois

APPENDIX E

Revised Statutes, Chapter 3, entitled "ADMINISTRATION OF ESTATES," Section 12, entitled "Illegitimates." Appellants at all times claimed that the said statute was in violation of the Fourteenth Amendment to the Constitution of the United States. The final judgment from which the appeal is taken is in favor of the validity of said statute.

Respectfully submitted,

One of the attorneys for
Appellants

Devereux Bowly
and
Charles Linn
Legal Assistance Foundation of Chicago
911 S. Kedzie Avenue
Chicago, Illinois 60612
638-2343 (312)

James Weill
and
Jane G. Stevens
Legal Assistance Foundation of Chicago
343 S. Dearborn Street
Chicago, Illinois 60604

John Henry Schlegel
Faculty of Law Jurisprudence
State University of New York at Buffalo
John Lord O'Brian Hall
Buffalo, New York 14260

IN THE
SUPREME COURT OF ILLINOIS

IN RE ESTATE OF SHERMAN GORDON,
Deceased,

DETA MONA TRIMBLE, and
JESSIE TRIMBLE,

PETITIONERS-
APPELLANTS,

VS.

JOSEPH ROOSEVELT GORDON,
ETHEL MAE KING,
WILLIAM GORDON,
HELLIE MAE GORDEY,
and MARY LOIS GORDON,

RESPONDENTS-
APPELLEES.

NO. 47339

NOTICE OF FILING

PLEASE TAKE NOTICE that on November 12, 1975, the NOTICE OF APPEAL in this case was mailed to Clell L. Woods, Clerk of the Supreme Court of Illinois, for filing.

One of the Attorneys for Appellants

Devereux Bowly
Legal Assistance Foundation of Chicago
911 South Kedzie Avenue
Chicago, Illinois 60612
638-2343

IN THE
SUPREME COURT OF ILLINOIS

IN RE ESTATE OF SHERMAN GORDON,
Deceased,

DETA MONA TRIMBLE, and
JESSIE TRIMBLE,
PETITIONERS-
APPELLANTS,

VS.

JOSEPH ROOSEVELT GORDON,
ETHEL MAE KING,
WILLIAM GORDON,
HELLIE MAE GORDEY,
and MARY LOIS GORDON,
RESPONDENTS-
APPELLEES.

NO. 47339

PROOF OF SERVICE

STATE OF ILLINOIS
COUNTY OF COOK

Devereux Bowly, being duly sworn states on oath that I have served a copy of Appellants' Notice of Appeal on:

Mr. Fred Klinsky, Attorney-at-Law
188 West Randolph Street
Chicago, Illinois 60601

Mrs. Ethel Mae King
2932 West Polk Street
Chicago, Illinois 60612

Mr. William Gordon
5672 West Fulton Street
Chicago, Illinois 60644

Mr. Joseph Roosevelt Gordon
General Delivery
Meridian, Mississippi 39301

Mrs. Hellie Mae Gordey
General Delivery
Meridian, Mississippi 39301

Ms. Mary Lois Gordon
General Delivery
Lawdale, Mississippi

by depositing a copy of same in a mail box with first class postage prepaid to the Chicago addresses, and air mail postage prepaid to the Mississippi addresses this 12th day of November, 1975.

_____

Subscribed and sworn to before me this 12th day of November, 1975.

_____
Norary Public

Devereux Bowly
One of the attorneys for Appellants
Legal Assistance Foundation of Chicago
911 S. Kedzie Avenue
Chicago, Illinois 60612
638-2343

APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5952

DETA MONA TRIMBLE AND JESSIE TRIMBLE,
Appellants,

—*vs.*—

JOSEPH ROOSEVELT GORDON, ET AL.
Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

FILED DECEMBER 22, 1975
PROBABLE JURISDICTION NOTED MARCH 22, 1976

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5952

DETA MONA TRIMBLE AND JESSIE TRIMBLE,
Appellants,

—*vs.*—

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Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

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August 12, 1974 Order Appointing Jessie Trimble Administrator to Collect

August 14, 1974 Heirship Hearing

August 15, 1974 Order Denying Petitioner Jessie Trimble's Petition For Letters of Administration

September 9, 1974 Order Declaring Heirship

September 19, 1974 Notice Of Appeal To Illinois Appellate Court

November 20, 1974 Docketing of Appeal

February 14, 1975 Motion Under Illinois Supreme Rule 302(b) For Direct Appeal, and Motion For Leave Under Illinois Supreme Court Rule 345 to File AMICUS CURIAE Brief In Consolidated Case of IN RE ESTATE OF LOUIS KARAS and IN RE ESTATE OF ROBERT WOODS

February 20, 1975 Order Entered In Illinois Supreme Court Allowing Motion For Direct Appeal and Granting Leave To File Brief Amicus Curiae in Case of IN RE ESTATE OF LOUIS KARAS and IN RE ESTATE OF ROBERT WOODS

June 2, 1975 Opinion of Illinois Supreme Court, IN RE ESTATE OF LOUIS KARAS, IN RE ESTATE OF ROBERT WOODS, 61 Ill. 2d 40 (1975)

September 24, 1975 Oral Argument Held Before Illinois Supreme Court, and Chief Justice Underwood Orally Delivered Opinion of Court

2. Petition For Letters of Administration, Determination of Heirship, Declaratory and Injunctive Relief (Including Paternity Order)

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, PROBATE DIVISION

74P 5902

Hearing on Petition set for _____ 1974
_____ ___m., Room _____
Chicago Civic Center
Chicago, Illinois 60602

Petition for Letters of Administration
Determination of Heirship
Declaratory and Injunctive Relief

JESSIE TRIMBLE for and on behalf of her minor child DETA MONA TRIMBLE, on oath states:

1. ~~SAMUEL~~ Sherman GORDON, whose place of residence at the time of death was 3007 West Fillmore Street, Chicago, Cook County, Illinois, died May 24, 1974, at Chicago, Illinois leaving no will.

2. The approximate value of the estate in this state is personal property of $4,000.

3. Decedent died leaving no spouse, DETA MONA TRIMBLE as his only descendant, his mother ETHEL KING, his brother WILLIAM GORDON, and on information and belief his father JOSEPH ROOSEVELT GORDON, address unknown, but believed to reside in Mississippi, and two sisters, whose names and addresses are unknown, but are believed to also reside in Mississippi.

4. Petitioner is mother and next friend of DETA MONA TRIMBLE, daughter of decedent, and is legally qualified to act as administrator or to nominate a resident of Illinois, on behalf of DETA MONA TRIMBLE.

5. DETA MONA TRIMBLE, born October 23, 1970, is the natural child of petitioner JESSIE TRIMBLE and decedent SHERMAN GORDON.

6. Petitioner JESSIE TRIMBLE and decedent SHERMAN GORDON were never intermarried.

7. On January 2, 1973, the Honorable WILLIE M. WHITING, Associate Judge of the Circuit Court of Cook County, entered an order, in the case of JESSIE TRIMBLE v. SHERMAN GORDON, 72 MC1-J846169, finding said SHERMAN GORDON to be the father of DETA MONA TRIMBLE. A certified copy of said order is attached hereto as Exhibit A.

8. Petitioner JESSIE TRIMBLE and decedent SHERMAN GORDON lived together with their child, DETA MONA TRIMBLE, from 1970 until his death. Decedent SHERMAN GORDON in his day-to-day activities publicly acknowledged DETA MONA TRIMBLE as his child, and supported her pursuant to the order attached hereto as Exhibit A.

9. The Illinois Probate Act, Illinois Revised Statutes Chapter 3, Section 12 provides in part:

> An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited if living . . .

By implication and interpretation said Section has been construed to mean that an illegitimate child is not an heir of its father.

10. Since decedent SHERMAN GORDON died without spouse and with only one descendant, DETA MONA TRIMBLE, if said DETA MONA TRIMBLE had been a legitimate child she would inherit the entire estate of decedent SHERMAN GORDON, according to the provisions of Sec. 11 of the Probate Act. As an illegitimate child, said DETA MONA TRIMBLE is not an heir of decedent SHERMAN GORDON, and would not inherit any of his property under the provisions and interpretations of Section 12 of the Illinois Probate Act.

11. For the State to provide by common law, statute or interpretation of statute that a legitimate child is the heir of its father, but an illegitimate is not the heir of its father, violates and contravenes the illegitimate

child's rights to due process and equal protection of the laws as guaranteed by Article I, Section 2 of the Constitution of the State of Illinois, and the Fourteenth Amendment to the Constitution of the United States.

12. Unless this honorable court provides the relief requested hereafter, DETA MONA TRIMBLE, will be denied due process and equal protection of the laws.

13. The assets of the estate of decedent SHERMAN GORDON include:

a) A 1974 Plymouth Satellite automobile.
b) On information and belief, wages owing to decedent, by his former employers MEL WOLF CHRYSLER PLYMOUTH, INC., and NATIONAL SECURITY COMPANY.

14. On information and belief decedent's mother, ETHEL KING and/or decedent's brother, WILLIAM GORDON, are in possession of said car, and have not filed any cause in probate, thus giving rise to the danger of dissipation of the assets of decedent's estate.

WHEREFORE, it is prayed that this Court

1. Decree, adjudge and declare DETA MONA TRIMBLE to be decedent's descendant and sole heir.

2. Declare the provision of Illinois Revised Statutes, Ch. 3 Sec. 12, relating to the heirship of illegitimate children null and void on its face and as applied to DETA MONA TRIMBLE for the reason that it violates Article I. Section 2 of the Constitution of the State of Illinois, and the Fourteenth Amendment to the Constitution of the United States.

3. Appoint petitioner, JESSIE TRIMBLE, administrator of decedent SHERMAN GORDON's estate, as mother and next friend of DETA MONA TRIMBLE.

4. Enter preliminary and permanent injunctions enjoining decedent's mother, ETHEL KING, and decedent's brother, WILLIAM GORDON, from using or disposing of decedent's automobile.

5. Order a court supervised sale of said automobile, with proceeds to be put in court supervised escrow pending ultimate disposition of the estate of decedent.

6. Enter preliminary and permanent injunctions enjoining decedent's mother ETHEL KING, and decedent's brother, WILLIAM GORDON, from disposing of any of the other assets of decedent SHERMAN GORDON's estate, and to turn over said assets to administrator.

7. Enter an authorization to appraise goods and chattels to Edward Anderson.

/s/ Jessie Lee Trimble
JESSIE TRIMBLE

(Jurat omitted in printing)

EXHIBIT A

THE UNITED STATES OF AMERICA

In The Circuit Court of Cook County, Illinois
Municipal Department, First District

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

Pleas, Proceedings and Judgments, before The Circuit Court of Cook County, Illinois, in the City of Chicago, in the County of Cook and State of Illinois, in the year of our Lord, one thousand nine hundred and SEVENTY THREE and the Independence of the United States, the one hundred and NINETY SEVENTH

Present: Honorable WILLIE M. WHITING

BERNARY CAREY, State's Attorney
RICHARD J. ELROD, Sheriff

Attest: MATTHEW J. DANAHER, Clerk.

Be it Remembered, to wit: that on the 2nd day of JANUARY 1973, the following among other proceedings were had in said court and entered of record therein, to-wit:

No. 72 MC1 J846169

CRIMINAL

THE PEOPLE OF THE STATE OF ILLINOIS EX REL
JESSIE TRIMBLE

v.

SHERMAN GORDON

DRAFT ORDER

PATERNITY DRAFT ORDER

No. J-846169

STATE OF ILLINOIS)
) ss
COOK COUNTY)

ENTERED IN SPECIAL ORDER BOOK #95
PAGE #165

IN THE CIRCUIT COURT,
COOK COUNTY, ILLINOIS

THE PEOPLE OF THE STATE OF ILLINOIS EX REL
JESSIE TRIMBLE

v.

SHERMAN GORDON

ORDER

This matter having come on to be heard upon complaint signed by the relatrix, the defendant being present in open court in his own proper person and having (admitted) the paternity of the child born out of wedlock and (having waived) examination of relatrix and the Court having held defendant to trial on the issue and upon the evidence duly presented the Court doth find the defendant Sherman Gordon guilty of being the father of the child Deta born out of wedlock 10-23 1970 (based on findings).

It is ordered that the plaintiffs have judgment on the (finding) herein, and that the defendant is the real father of the child Deta of the relatrix herein, which was born out of wedlock on 10-23 1970.

Further, the Court having heard evidence upon the requirements of the said child for its support, maintenance, education and welfare, and upon the expenses of the mother during her pregnancy, confinement and

recovery, and having taken into account financial condition and circumstances of the defendant and the income and resources of the mother which are or may be available for the support of said child.

IT IS HEREBY ORDERED, ADJUDGED AND DIRECTED THAT DEFENDANT PAY TO the Clerk of this Court the sum of 15.00 Dollars per week commencing 1-5-73 as and for the support maintenance, education and welfare of the said child until further order of this Court, and monies to be paid over to the relatrix (or) ..... as received.

SUBJECT TO FURTHER ORDER OF THE COURT.

IT IS FURTHER ORDERED, ADJUDGED AND DIRECTED that the defendant pay to relatrix or ..... the sum of ..... dollars as and for the expense of the mother during pregnancy, confinement and recovery as follows:

DATED: 1-2-73

ENTER:

/s/ [Illegible]
Judge

STATE OF ILLINOIS)
) ss.
COUNTY OF COOK)

I, MATTHEW J. DANAHER, Clerk of the court and the keeper of the records and files thereof, in the City and State aforesaid, do hereby certify the above and foregoing to be a true, perfect and complete copy of certain proceedings made and entered of record in said Court in acertain cause lately pending in said Court, between THE PEOPLE OF THE STATE OF ILLINOIS EX REL JESSIE TRIMBLE plaintiff and SHERMAN GORDON defendant.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the Seal of said Court, at Chicago, aforesaid, JUNE 14, 1974.

/s/ Matthew J. Danaher
Clerk

(Certificate of service omitted in printing)

3. ORDER APPOINTING JESSIE TRIMBLE ADMINISTRATOR TO COLLECT

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—PROBATE DIVISION

No. 74 P 5902

Docket 797

Page 76

[Filed Aug. 12, 1974, Matthew J. Danaher,
Clerk of the Circuit Court]

Estate of SHERMAN GORDON Deceased

ORDER APPOINTING LEGAL REPRESENTATIVE OF DECEDENT'S ESTATE

On the verified petition of JESSIE TRIMBLE for issuance of letters as legal representative to JESSIE TRIMBLE who has presented her bond which has been approverd, or its acceptance of office,

It is ordered that letters * of Administration to Collect issue to JESSIE TRIMBLE and that an authorization to appraise goods and chattels issue to Edward Anderson.

----------, 19 ----

ENTER:

Judge

Name Devereux Bowly
Attorney for petitioner

Address 911 S. Kedzie Avenue

City Chicago, Illinois 60612

Telephone 638-2343

MATTHEW J. DANAHER
Clerk of the Circuit Court

ANTHONY G. GIROLAMI
Associate Clerk, Probate Division

* Insert "testamentary," "of administration," "of administration to collect," "of administration de bonis non," "of administration with the will annexed" or "of administration de bonis non with the will annexed".

4. ORDER DENYING JESSIE TRIMBLE'S PETITION FOR LETTERS OF ADMINISTRATION

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT—PROBATE

No. 74 P 5902

[Filed Aug. 15, 1974, Matthew J. Danaher,
Clerk of the Circuit Court

ESTATE OF SHERMAN GORDON, Deceased.

v.

ORDER

Petition for Letters of Administration by Jessie Trimble being represented by counsel, and after hearing on said petition it is hereby ordered said petition be denied.

Counsel for petitioner is hereby ordered to prepare and present an order determining heirship upon the filing of the transcript of testimony adduced in open court on August 14, 1974, as to the heirs of the decedent.

----------, 19 ----

ENTER:

Judge

Name Devereux Bowly & Charles A. Linn
Attorneys for Petitioner

Address 911 S. Kedzie Avenue

City Chicago, Illinois 60612

Telephone 638-2343

MATTHEW J. DANAHER
Clerk of the Circuit Court of
Cook County

5. Order Declaring Heirship

IN THE CIRCUIT COURT OF
COOK COUNTY, ILLINOIS
County Department, Probate Division

No. 74 P 5902

Docket 797

Page 76

Estate of Sherman Gordon, Deceased

Order Declaring Heirship

After considering evidence concerning heirship, the court declares that SHERMAN GORDON, deceased, left surviving as his only heirs:

1. JOSEPH ROOSEVELT GORDON, his father;
2. ETHEL MAE KING, his mother;
3. WILLIAM GORDON, husband of Deborah Gordon, his brother;
4. HELLIE MAE GORDEY, wife of Robert Gordey, his sister;
5. MARY LOIS GORDON (MARRIAGE NAME UNKNOWN, his sister;
6. HOWARD KING, JR., his half-brother;
7. Unknown heir or heirs at law, if any, if living, whose name or names, address or addresses are unknown and upon due and diligent search and inquiry have not been ascertained;

HIS ONLY HEIRS AT LAW AND NEXT OF KIN.

_____, 19 __

ENTER:

_____
Judge

Devereux Bowly
911 South Kedzie
Chicago, Illinois

Matthew J. Danaher
Clerk of the Circuit Court

Anthony G. Girolami
Associate Clerk, Probate Division

6. RECORD OF PROCEEDINGS IN TRIAL COURT

STATE OF ILLINOIS)
) ss:
COUNTY OF COOK)

IN THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT—PROBATE DIVISION

No. 74 P 5902

Docket 797

Page 76

In the Matter of the Estate of
SHERMAN GORDON, deceased

TESTIMONY TAKEN in the Circuit Court of Cook County, County Department, Probate Division, Judge Robert C. Springsguth presiding on the 14th day of August, 1974, in the matter of PROOF OF HEIRSHIP in the above-named estate.

IN ATTENDANCE:

Mr. Robert C. Springsguth, Judge.

APPEARANCES:

Mr. Fred Klinsky, for Ethel King;

Mr. Devereux Bowly & Mr. Charles Linn,
for Jessie Trimble.

[2] THE COURT: You may proceed.

MR. BOWLY: Good morning, your Honor, my name is Devereux Bowly, I am attorney with the Legal Assistance Foundation, my colleague is Charles Linn, our office is 911 South Kedzie, Chicago, Illinois and we are here this morning on behalf of the petitioner Jessie Trimble.

I wanted to just say a word or two about the case to put it in context because I think it might be more complicated than it looks.

The decedent in this case was a gentleman by the name of Sherman Gordon. He had only one child whose name is Deta Mona Trimble, she is about four-years old.

Mr. Gordon was never married, the child was commonly known as an illegitimate child. Our petitioner is the mother of the child and her name is Jessie Trimble. Mr. Gordon died on May 24, 1974.

As far as we know at this time the estate consists basically of a new car worth maybe up to $4,000. The only descendant of Mr. Gordon when he died is this child, Deta Mona Trimble. There is no question about the paternity of the child [3] there is a court order appended to the petition by Judge Whiting of the Circuit Court of Cook County, that found, as a matter of law, that the decedent was, in fact, the father of Deta Mona Trimble.

We are aware that in the past under the Illinois Statute illegitimate children had not been allowed to inherit from their father's, but it is our position that the statute that so provides in Illinois is a true contravention of the equal protection of the State's constitution and the United States Constitution and you are required under the two constitutions to find that the only heir at law of the decedent's is this small child, Deta Mona Trimble.

Just to say a few words about equal protection, if when the man had died, if the child had been legitimate and if she would have inherited everything, if an legitimate child survives her father and there was no spouse, the child would have inherited everything.

We contend the mere fact that the child was illegitimate cannot change her status under the equal protection clause and cannot deprive her of the property.

[4] THE COURT: Who do you represent?

MR. KLINSKY: I am representing the mother, Ethel King.

THE COURT: Do you have a statement?

MR. KLINSKY: Yes.

MR. BOWLY: Just to complete the record, I think it should reflect that we were before you on August 7. At that time Ethel King and the decedent's brother, William Gordon, appeared in court, asked for a continuance to get an attorney. We did not object to that and the case was continued until today.

Also I would like to bring the Court up-to-date on one other development. You may have remembered the first time we were in court, the matter of the car, the possible dangers to the car and so on were discussed, at the suggestion of your Honor, we appeared before Judge Kogut, who was substituting for Judge Dunne and have secured an order appointing our client, Jessie Trimble, the administrator to collect the estate.

We intend, pursuant to that order, we intend to get the car, make sure the insurance proceeds are paid off to sell the car and then put the proceeds in an interest bearing account, pending [5] the outcome of this litigation.

MR. KLINSKY: My name is Fred Klinsky, 188 West Randolph Street, I represent Ethel King, the mother of the decedent.

At this time we would like to show that Mr. Gordon's correct address was 2932 West Polk Street in Chicago, shows by his records from the Internal Revenue Service and also his driver's license that is the address of his mother and lived there continuous since 1969.

In Paragraph 4, the petitioner alleges that, "petitioner is mother and next friend of Deta Mona Trimble, daughter of decedent and is legally qualified to act as administrator or to nominate a resident of Illinois, on behalf of Deta Mona Trimble."

According to the statute of priority this wouldn't be correct and I think the mother should be appointed.

The child has no status. They specifically set out in Chapter—in Paragraph 9 that the child is not an heir of the father by the Illinois law and I think this point in case was quite clear on this. I don't see any standing for [6] this particular petitioner at all.

I'll stand by the statute on this particular matter.

MR. BOWLY: Before I address his argument on the merits, let me say, first of all that Jessie Trimble is the one who has been appointed administrator, not the four-year old child.

MR. KLINSKY: I made a mistake.

MR. BOWLY: Secondly, as far as the matter of administrator, I don't think that is properly before the Court now.

In any event, we will offer proof that he did, in fact, live with Jessie Trimble, but used his mother's address as his mailing address.

We are merely here this morning on heirship hearing and I think those matters he is bringing—

THE COURT: Who is going to testify to the heirship?

MR. LINN: We have Jessie Trimble to testify.

THE COURT: Swear the witness.

(Witness sworn)

[7] JESSIE TRIMBLE called as a witness herein, and after having been first duly sworn, was examined and testified as follows:

EXAMINATION BY THE COURT:

Q Your name is?
A Jessie Lee Trimble.
Q Your address is?
A 3007 West Filmore.
Q Are you related to Sherman Gordon?
A A friend.
Q A what?
A A friend, he was my common law husband, but that don't count.
Q You can't testify under the rules of court unless you have an affidavit for non-relative to testify.
A I said I was a friend.

MR. KLINSKY: Your Honor, there is a relative in court, the decedent's mother is here.

THE COURT: Let her testify.

(Witness sworn)

[8] ETHEL KING called as a witness herein, and after having been first duly sworn, was examined and testified as follows:

EXAMINATION BY THE COURT:

Q Your name, please?
A Ethel Mae King.
Q Ethel Mae King?
A Right. I live at 2932 West Polk Street.
Q Were you related to Sherman Gordon?
A I am his mother.
Q When did he die?
A May 23, 1974.
Q How old was he when he died?
A 28.
Q And his home address when he died was?
A The same, 2932 West Polk Street.
MR. BOWLY: This is a point in controversy.
THE COURT: Q How many times was he married?
A He never been married.
Q Did he have or adopt any children?
A No.
[9] Q His father's name was?
A Joseph Roosevelt Gordon.
Q Is he living?
A Yes, he is.
Q How many times was he married?
A Twice.
Q His first wife's name was?
A Ethel Mae Gordon.
Q Is she living?
A Yes, she is here.
MR. KLINSKY: That is her, that is what she is saying.
THE COURT: Were you divorced?
A Yes.

Q How many children were born of your marriage?
A Four.
Q Any of those children, four children die at infancy or under the age of ten?
A No.
Q Name one of the children?
A William Gordon.
Q Living?
A Yes.
Q Over 18?
[10] A Yes.
Q Married?
A Yes.
Q Wife's first name?
A Deborah Gordon.
Q She's living?
A Yes.
Q Name another child born of your marriage.
A Hellie Mae Gordon, H-e-l-l-i-e.
Q Is she living?
A Yes, she is.
Q She's over 18?
A Yes, she is.
Q Married?
A Yes.
Q Husband's name?
A (No response).
Q You don't know his name?
A I think his name is Robert, they don't live here.
Q Do you know his last name?
A G-o-r-d-e-y.
Q Is he living?
A Yes, he is.
[11] Q Name another one of your children.
A Mary Lois Gordon.
Q Is she living?
A Yes, she is.
Q She is over 18?
A Yes.
Q Married?
A Yes, she is.

Q Husband's name?
A I can't remember his name.
Q You don't know his name?
A No.
Q You don't know his last name?
A No.
Q Is he living?
A Yes, he is.
Q And the other child of your marriage was?
A That is the four I have.
Q Was there another?
A The one who is dead made four.
Q Did you and your husband Joseph ever adopt any children?
A No, we didn't.
Q Was there any other children born to [12] yourself during your lifetime besides—
A Yes, there is by my husband now.
Q Joseph Gordon's second wife's name was—I withdraw that question.

How many other children were born to you besides these four children?
A I have one more.
Q The name?
A Howard King, Jr.
Q Is he living?
A Yes, he is.
Q He is over 18?
A He is 13.
Q And Joseph Gordon's second wife's first name was?
A I don't know his second wife.
Q Is she living?
A I don't know that.
Q Do you know how many children were born of the second marriage?
A No, I don't.
Q Were there any children adopted?
A I don't know.
Q How many times have you been married?

[13] A Two times.
Q And your first husband's name was Joseph?
A Roosevelt Gordon.
Q The second husband?
A Howard King.
Q Is he living?
A Yes, he is.
Q And there is one child born of that marriage?
A That is right.
Q No children adopted?
A No.
Q Was there any other children born to yourself during your lifetime?
A No, we don't—

THE COURT: We have a lot more heirs here, don't we?

MR. BOWLY: There was a half-brother we didn't know about.

THE COURT: Any questions you want to ask?

MR. LINN: I have a couple of questions I was going to ask Mrs. King.

[14] CROSS EXAMINATION BY MR. LINN:

Q Mrs. King, did you testify that the decedent had no children?
A No, I didn't say that.
Q How many children did the decedent Sherman Gordon have?
A Only one I know. Her name is Deta Mona and I couldn't swear to that at all.

MR. KLINSKY: She is saying she only heard that he had one child, this child that they are claiming.

MR. LINN: I am determining whether the decedent died leaving any children.

Q You the testifying that Sherman Gordon had on child?

MR. KLINSKY: Objection.

THE COURT: Sustained. Statute says an illegitimate child is not an heir of the father.

MR. LINN: We are testing the validity of the statute in order to attack that statute. I think we are entitled to show there is an illegitimate child here.

[15] MR. KLINSKY: The statute is very clear who is the heir of the proceeding.

MR. BOWLY: The statute does not say that an illegitimate child is not the heir of the father, it just says the child does not inherit. I think we still have latitude here to discuss the child, to ask the witness about the child and so on.

THE COURT: What is your question?

MR. LINN: The question is, did Sherman Gordon have any children?

You answered yes, I believe, is that right, Mrs. King?

A My knowing, he said he had one little girl, was named Deta Mona.

MR. KLINSKY: Object to this again.

MR. BOWLY: I think the objection is a little late.

THE COURT: Objection overruled.

MR. LINN: To clarify the record, would that be Deta Mona Trimble?

A I heard that, I really don't know.

MR. LINN: Do you know the mother of that child?

A There she is standing, (indicating).

Q For the record you are indicating [16] Jessie Trimble.

THE COURT: The mother would be a better witness.

MR. LINN: We will put her on.

Q You are indicating Jessie Trimble, is that right?

A About what?

Q As being the mother of Deta Mona Trimble?

A Yes.

MR. LINN: I have no further questions.

Can we swear in—

THE COURT: She's already been sworn.

JESSIE TRIMBLE recalled as a witness herein, and after having been previously sworn, was examined and testified as follows:

DIRECT EXAMINATION BY MR. LINN:

Q State your name and address?

A Jessie Trimble, 3007 West Filmore.

Q Did you know the decedent in this matter?

A Yes, I did.

THE COURT: What is his name?

THE WITNESS: Sherman Roosevelt Gordon.

[17] MR. LINN: Did you and he live together?

A Yes, we did.

Q For how long a period of time?

A Five years.

Q During that time did you have any children?

A Yes, one.

Q What is the name and age of that child?

A Deta Mona Trimble.

Q And the father of that child was?

A Sherman Roosevelt Gordon.

Q Were you ever in Court to determine the paternity of the child that you had?

A Yes.

Q When was that, can you recall?

A I can't remember the exact date.

THE COURT: I didn't hear you.

THE WITNESS: I don't recall the exact date.

MR. LINN: Q Can you recall approximately how long ago that might have been?

A Oh, about three years ago.

Q To refresh your recollection I show you [18] a copy of an order entered by Judge Willie Whiting, January 2, 1973, does that refresh your recollection as to any court appearance you may have been at to determine the paternity of Deta Mona Trimble?

A Yeah, I know we went to court down at 11th and State and then over to Branch 33 on Chicago Avenue.

Q And can you tell this Court the result of that hearing?

A Yes, the Judge asked him was Deta Mona Trimble his daughter and Sherman Gordon said yes.

MR. KLINSKY: I object to that.

THE COURT: The objection is sustained and maybe stricken. This record speaks for itself.

MR. LINN: Simply having her testify of her recollection as to what occurred. Want to introduce the copy of the order, it is attached to the petition, I'll ask that it be entered into the record as an official document of a prior order.

THE COURT: We take judicial notice of that order.

MR. LINN: Q Now, for the past five years you—well, where does Deta live?

A 3007 West Filmore.

Q Up until the time of his death where did [19] Sherman Gordon live?

A 3007 West Filmore.

Q Did he in his everyday action acknowledge Deta Mona as his daughter?

A Yes, he did.

MR. LINN: I have no further questions.

DIRECT EXAMINATION (continued)

BY MR. BOWLY:

Q There has been some discussion of a Polk Street address, was that his mother's address?

A Yes.

Q Did he, in fact, put that address on his business papers?

A Yes.

Q Why?

A Because I moved quite a bit during the time we had been together. He never changed his mailing address.

Q He stayed with you?

A Yes, he did.

Q Now, when he died what property did he have?

A He had a car, a brand new car, 1974, as [20] far as I know.

Q You never married him?

A No, we didn't.

Q Did you ever talk to him about marriage?

A Yes.

MR. KLINSKY: I object to this, your Honor.

THE COURT: What is the purpose of this?

MR. LINN: We will withdraw the question.

MR. BOWLY: I have no further questions at this time.

MR. KLINSKY: We have no questions of this witness.

THE COURT: Anything else?

MR. BOWLY: Nothing else.

THE COURT: What is your motion?

MR. KLINSKY: Motion is that this petition be stricken, your Honor.

THE COURT: On what grounds?

MR. KLINSKY: On the grounds the child is not an heir of the father and the lawful heirs should be issued letters testamentary to the mother of this particular case. The child has no standing in court, that is supposedly, this woman of this child, the mother has no standing in this Court.

[21] MR. LINN: I object to Counsel's motion, if only on the grounds that there is no counter petition before this Court. The only petition before your Honor is to appoint Jessie Trimble as administrator of the estate and I would also like to point out Jessie Trimble, whose already been appoint by Judge Kogut administrator to collect the estate and we would like in open court the acknowledgement of this order and an agreement to turn over the assets of the estate pending the final determination of this litigation.

MR. KLINSKY: I object to this, I just got into the case. We will object to that order, we will present a petition to vacate that order.

THE COURT: As far as the administrator is concerned doesn't have to be necessarily an heir, any person in interest could be an administrator to collect. This petition does not follow the statute. The statute says who could be appointed administrator of the estate and no where in the statute does it say mother of illegitimate child can be appointed administrator of the estate of the father.

[22] MR. LINN: Any qualified adult may be appointed administrator subject to the duties of that office.

THE COURT: Where did you see that?

Here is the statute.

MR. LINN: I don't think there is anything that prevents our client as being appointed administrator.

MR. BOWLY: The petition is here petitioning not as a common law wife or any status like that but as the next friend and mother of the only child of the decedent and so in that capacity as the next friend and mother of the only child and we think the court is constrained and required by the United States and Illinois Constitution to hold any Illinois law unconstitutional which would prohibit the child or child's next friend of being administrator.

THE COURT: I agree with that and we have that statute who could be appointed administrator starting with the spouse, children, mother, father, then goes down to the executor, public administrator—

MR. BOWLY: Any provision, whether it be by statute or court interpretation, would prohibit the ilegitimate child so named is illegal unconstitutional [23] and because of the constitutional mandate we believe you have to appoint the petitioner here as next friend and mother of child—

MR. LINN: Clearly the mother of a minor would be qualified to act on her behalf.

THE COURT: No. That is the only fault I find with this petition.

You have to follow the statute. The statute is very clear.

MR. LINN: I would—under that Section 2, sub Section 296, that the children or any other person nominated by them are entitled to collect.

THE COURT: This is a minor. The minor has no power to be administrator. You have to have somebody who is related or public administrator file a petition and I will be glad to consider it, but your off base right on this.

MR. LINN: It is my understanding of the law that the mother of a minor is qualified in any legal proceeding to act on behalf of that minor in any legal action.

THE COURT: It's never been done in the probate court. You are talking about a personal injury accident where the next friend files a suit.

[24] You think that applies in this matter?

MR. LINN: In this particular situation—

THE COURT: It doesn't follow the statute. I can't overcome that. Nowhere in the statute does it say next friend of a minor is appointed administrator.

MR. BOWLY: Is there not a procedure where the public administrator—I am not sure of the right word, "waiver"—

THE COURT: Sure.

MR. BOWLY: Would it be appropriate for us to continue this case and seek a waiver?

THE COURT: What good would that do?

MR. KLINSKY: We still have somebody in line.

THE COURT: Do you want to file a petition?

MR. KLINSKY: We will file a petition.

THE COURT: That will solve your matter. You want to file a petition to have this party added as an heir, but this petition is faulty in form. Can't have a next friend be appointed administrator.

MR. KLINSKY: According to the statute this party has no standing in court. Under the law the person has no standing according to the case law.

THE COURT: That is what I am trying to get over.

[25] MR. KLINSKY: I think we have a mute point with the petition altogether. There is a mute point according to the statute, I don't know what we are arguing. I think this whole petition should be dismissed.

THE COURT: What is your motion?

MR. KLINSKY: I move that this petition be dismissed.

THE COURT: Could you write such an order?

MR. KLINSKY: Yes, I will.

MR. BOWLY: We certainly would oppose such a motion for the reason we stated before and I would like to inquire how that would affect the fact Jessie

Trimble has already been appointed administrator? So, it is the law that the administrator to collect can proceed.

THE COURT: Sure.

MR. BOWLY: Until an administrator is appointed. Okay.

(Which were all the proceedings had in the above-entitled matter.)

7. Notice of Appeal To Illinois Appellate Court

State of Illinois)
) ss.
County of Cook)

APPEAL TO APPELLATE COURT—
FIRST DISTRICT
FROM THE CIRCUIT COURT OF COOK COUNTY
COUNTY DEPARTMENT, PROBATE DIVISION

No. 74 P 5902

Docket 797

Page 76

In the Matter of the Estate of
Sherman Gordon, Deceased

Notice of Appeal

JESSIE TRIMBLE, for and on behalf of her minor child DETA MONA TRIMBLE, by one of her attorneys Devereux Bowly, hereby appeals from the Order Declaring Heirship entered September 9, 1974, in the above captioned cause, and prays that said order be reversed and remanded with directions that DETA MONA TRIM-

BLE be adjudged and declared to be the sole heir of decedent, Sherman Gordon.

Respectfully submitted

Devereux Bowly
and
Charles Linn
Legal Assistance Foundation of Chicago
911 S. Kedzie Avenue
Chicago, Illinois 60612
638-2343

Of Counsel:

John Henry Schlegel
Faculty of Law Jurisprudence
State University of New York at Buffalo
John Lord O'Brian Hall
Buffalo, New York 14260

Jane Stevens and James Weill
Legal Assistance Foundation
64 East Jackson Blvd.
Chicago, Illinois 60604

(Certificate of service omitted in printing)

8. Motion For Direct Appeal To Illinois Supreme Court, and To File AMICUS CURIAE Brief

APPEAL TO THE SUPREME COURT OF ILLINOIS
FIRST DISTRICT FROM
THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Appellate Court No. 61137

Trial Court No. 74 P 5902

[Received Feb. 14, 1975, Clerk, Supreme Court]

In Re Estate of Sherman Gordon, Deceased,
Deta Mona Trimble, and Jessie Trimble,
petitioners-appellants

—*vs*—

Joseph Roosevelt Gordon, Ethel Mae King, William Gordon, Hellie Mae Gordey, and Mary Lois Gordon, respondents-appellees

Motion Under Supreme Court Rule 302(b)

DETA MONA TRIMBLE and JESSIE TRIMBLE, Petitioners-Appellants, through one of their attorneys Devereux Bowly, pursuant to Supreme Court Rule 302 (b), respectfully request the Supreme Court of Illinois to accept the direct appeal of the above-entitled cause for prompt adjudication as it is a case in which the public interest requires expeditious determination. In support of said motion, movants state as follows:

1. That there is now pending in the Illinois Supreme Court, the case of IN RE ESTATE OF LOUIS KARAS, Deceased, filed on September 9, 1974, under case number 46986.

2. That it has come to our attention that the case of IN RE ESTATE OF ROBERT WOODS has been con-

solidated into the case of IN RE ESTATE OF LOUIS KARAS, number 47092.

3. That the instant case, and the cases of IN RE ESTATE OF LOUIS KARAS, and IN RE ESTATE OF ROBERT WOODS all involve the interpretation of Illinois Revised Statutes, Ch. 3, Sec. 12(8) wherein it is provided that illegitimate children only inherit from their mothers. All three cases involve constitutional challenges to the disinheritance of illegitimate children from their fathers.

4. That movants believe that the fact situation in the instant case may more clearly illustrate defects in the statute cited, than in the two cases now pending in the Illinois Supreme Court. The movants believe further, that they are raising legal arguments that may not have been raised in the pending cases, and that a full adjudication of the statute cited would be assisted by permitting immediate appeal of the instant case.

5. That movants have filed their appeal in the Appellate Court of Illinois, First District, No. 61137 and will file their Brief and Designation of Excerpts From Record there on February 21, 1975.

WHEREFORE, DETA MONA TRIMBLE and JESSIE TRIMBLE, respectfully moves that this Honorable Court enter an order directing the appeal of their case to be taken directly by the Illinois Supreme Court and that the cases of IN RE ESTATE OF LOUIS KARAS and IN RE ESTATE OF ROBERT WOODS, be consolidated with it, in accordance with the prepared draft order hereto attached.

If this Honorable Court sees fit not to grant this motion, then DETA MONA TRIMBLE and JESSIE TRIMBLE move in the alternative, for leave under Rule 345, to file a brief AMICUS CURIAE in the cases of

IN RE ESTATE OF LOUIS KARAS and IN RE ESTATE OF ROBERT WOODS.

Respectfully submitted,

Devereux Bowly
One of the Attorneys for Movants
Legal Assistance Foundation of Chicago
911 S. Kedzie Avenue
Chicago, IL 60612
(312) 638-2343

(Notice of filing and Certificate of Service omitted in printing)

9. LETTER FROM ILLINOIS SUPREME COURT GIVING NOTIFICATION OF ORDER ALLOWING DIRECT APPEAL AND GRANTING LEAVE TO FILE AMICUS CURIAE BRIEF

[SEAL]

STATE OF ILLINOIS
OFFICE OF CLERK OF THE SUPREME COURT
Springfield
62706

February 20, 1975

[Received Feb. 21]

CLELL L. WOODS
Clerk

Telephone
Area Code 217
782-2035

Mr. Devereux Bowly
Attorney at Law
Legal Assistance Foundation of Chicago
911 S. Kedzie Avenue
Chicago, Illinois 60612

In re: Deta Mona Trimble, et al., appellants, vs. Joseph Roosevelt Gordon, et al., appellees.
No. 47339

Dear Mr. Bowly:

This office has today received and filed, under docket number 47339, your notice, motion, statement in support of motion, objections to certain portions of the motion, and order entered by Justice Daniel P. Ward (1) allowing the motion by appellants for direct appeal under Rule 302(b) in the above cause; (2) denies that part of the motion to consolidate this case with consolidated cases Nos. 46986-47092, and (3) grants leave to appellants to file a brief in the nature of a brief amicus curiae on or before March 5, 1975, in consolidated cases Nos. 46986-47092.

A certified copy of this order has today been forwarded to the Clerk of the Appellate Court, First District, and the Clerk of the Circuit Court of Cook County.

Very truly yours,

/s/ CLELL L. WOODS
Clerk of the Supreme Court

CLW:gn

cc—Attys. Burditt and Calkins
Atty. Mary Reardon Hooton
Atty. Gerald W. Shea

P.S. Mr. Bowly: At your early convenience, may we ask that you please forward the $25.00 statutory docket fee.

10. Opinion of Illinois Supreme Court, IN RE ESTATE OF LOUIS KARAS, IN RE ESTATE OF ROBERT WOODS

SUPREME COURT OF ILLINOIS
UNITED STATES OF AMERICA

STATE OF ILLINOIS)
) ss.
SUPREME COURT)

OPINION

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the twelfth day of May in the year of our Lord, one thousand nine hundred and seventy-five, within and for the State of Illinois.

PRESENT: ROBERT C. UNDERWOOD, CHIEF JUSTICE
JUSTICE WALTER V. SCHAEFER
JUSTICE DANIEL P. WARD
JUSTICE JOSEPH H. GOLDENHERSH
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE CHARLES H. DAVIS
JUSTICE HOWARD C. RYAN
WILLIAM J. SCOTT, ATTORNEY GENERAL
WILLIAM G. LYONS, MARSHAL
ATTEST: *CLELL L. WOODS*, CLERK

Be it Remembered, that afterwards, to-wit, on the 2nd day of June, 1975 the opinion of the Court was filed in said case and entered of record in the words and figures following, to-wit:

No. 46986
47092
Cons.

MARY SODERMARK, et al., APPELLANTS

vs.

EVENGELIA KARAS, et al., APPELLEES

APPEAL FROM APPELLATE COURT FIRST DISTRICT

CLELL L. WOODS
Clerk of the Supreme Court
State of Illinois

In re ESTATE OF LOUIS KARAS.—(Mary Sodermark, Appellant, v. Evangelia Karas, Appellee.)—*In re* ESTATE OF ROBERT WOODS.—(Margaret Marie Collins, Appellant, v. Addie Wheeler, Adm'r, Appellee.)

MR. JUSTICE KLUCZYNSKI delivered the opinion of the court:

These consolidated appeals present the common issue of whether an acknowledged illegitimate child may inherit from her father who died intestate never having married the child's mother. A subsidiary issue involves the right of an illegitimate to be appointed the administrator of the estate under these circumstances.

The relevant sections of the Probate Act read as follows:

"Sec. 12. Illegitimates.

• • • •

An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if liv-

ing. A child who was illegitimate whose parents intermarry and who is acknowledged by the father as the father's child is legitimate." Ill. Rev. Stat. 1973, ch. 3, par. 12.

"Sec. 96. Persons entitled to preference in obtaining letters.) The following persons are entitled to preference in the following order in obtaining the issuance of letters of administration * * *:

* * * *

(2) The children or any person nominated by them." Ill. Rev. Stat. 1973, ch. 3, par. 96.

In cause No. 46986 Louis Karas died intestate. The circuit court of Cook County entered an order declaring Evangelia Karas, his widow, to be his only heir-at-law. Thereafter Mary Sodermark, petitioner, sought to vacate the order of heirship claiming that she was the child of Louis Karas and Estelle Ross, who never married. The Sodermark petition alleged that Estelle Ross had been institutionalized for psychiatric reasons and apparently upon her release had disappeared. The petition further averred that Mary Sodermark had been acknowledged as the child of Louis Karas and that he had contributed to her support while she lived with an aunt. The petition asserted that Louis Karas and his wife, Evangelia, lived for a time with Mary Sodermark, her husband and family and that Louis Karas had contributed a downpayment to the purchase of the Sodermark's house. The circuit court granted Evangelia's motion to strike and dismiss the Sodermark petition. The appellate court affirmed (*In re Estate of Karas*, 21 Ill. App. 3d 564), and we granted leave to appeal.

In cause No. 47092 Robert Woods died intestate at the age of 81. He left no surviving spouse and no legitimate children or descendants thereof. The circuit court of Cook County determined that there existed certain collateral heirs-at-law of the deceased. Margaret Marie Collins, petitioner, then attempted to obtain letters of administration and a declaration of heirship on her behalf. She asserted in her petition that she was the

acknowledged illegitimate daughter of the deceased and a lawful heir to his $37,000 estate. The circuit court sustained the motion of certain collateral heirs-at-law to strike and dismiss the Collins' petition, and we granted direct appeal (50 Ill.2d R. 302(b)).

We have permitted the filing of an *amicus* brief in these consolidated cases. The *amicus* has pending in this court a direct appeal involving similar issues. (*In re Estate of Gordon*, No. 47339.) The illegitimate in *Gordon* is a minor. *Amicus* asserts that prior to the death of the unmarried father there had been a judicial order adjudicating paternity and ordering that he support this child.

As accepted by the motions to strike and dismiss the petitions, for the purpose of these appeals Mary Sodermark and Margaret Marie Collins are the acknowledged illegitimate children of the respective decedents, who never married the natural mothers. (*Gertz* v. *Campbell* (1973), 55 Ill.2d 84, 87.) Thus they have not been legitimatized in accord with section 12 of the Probate Act, and under prior case law (*Krupp* v. *Sackwitz* (1961), 30 Ill. App. 2d 450, *appeal denied*, 21 Ill.2d 621) are not considered heirs of their fathers, who died intestate.

At common law an illegitimate could not inherit. (*Blacklaws* v. *Milne* (1876), 82 Ill. 505, 506.) By statute the result of this rule was ameliorated. (Ill. Ann. Stat., ch. 3, sec. 12, Historical Note, at 64 (Smith-Hurd 1961); see also 2 Horner, Probate Practice and Estate, secs. 1348, 1350-51 (4th ed. 1960).) In *Smith* v. *Garber* (1918), 286 Ill. 67, the court, in discussing the predecessor provisions of section 12 of the Probate Act, stated:

"'Sections 2 and 3 of our Statute of Descent were enacted for the purpose of obviating the undue severity of the common law and of erecting a rule more consonant with justice to an innocent and unfortunate class. Section 2 * * * abrogates the common law rule that an illegitimate is the child of nobody and could not take property by inheritance, even from its own mother.' (*Robinson* v. *Ruprecht*, 191 Ill. 424.) Under the common law an il-

legitimate was considered *filius nullius*. (1 Blackstone's Com. *459.) Under the statutes passed in this State in relation to illegitimate children, 'an illegitimate person is recognized as the child of his mother, as regards the descent of property.' (*Miller* v. *Williams*, 66 Ill. 91.) In *Bales* v. *Elder*, 118 Ill. 436, this court said that it was the purpose of the legislature in enacting the statute as to illegitimate children, to remove the common law disability of inheritance and place them more nearly on a level with legitimates. (See, also, *Jenkins* v. *Drane*, 121 Ill. 217; *Chambers* v. *Chambers*, 249 id. 126.) In *Robinson* v. *Ruprecht*, *supra*, this court said (p. 433): 'The [rule of the common law] visited the sins of the parents upon the unoffending offspring, and could not long survive the truer sense of justice and broader sense of charity that came with the advancing enlightenment and civilization of the race.'" 286 Ill. 67, 70-71.

It is argued in the Sodermark appeal that this court modify the common law rule that an acknowledged illegitimate may not be an heir of the intestate father's estate. She urges that she be allowed to inherit to the extent of a legitimate child. This is not a tenable argument.

For nearly 150 years this State by statute has mitigated the effect of the common law rule prohibiting inheritance by illegitimates. While discussing other Probate Act provisions, this court has held that "The regulation of the descent of property and of the right to devise property as well as the method of conveying and the manner of creating estates and the character and quality of estates created, is purely statutory and entirely within the control of the legislature. [Citation.] Being wholly statutory the rules of descent may be changed by the legislature in its discretion, and conditions or burdens may be imposed upon the right of succession." (*Steinhagen* v. *Trull* (1926), 320 Ill. 382, 387; see also *Jahnke* v. *Selle* (1938), 368 Ill. 268, 271.) Moreover, *Miller* v. *Pennington* (1905), 218 Ill. 220,

involved litigation contesting certain property of the intestate decedent. He had fathered two illegitimate sons by a woman whom he subsequently married. The question presented concerned whether these sons could be deemed to be legitimatized and could therefore share as heirs-at-law with the other legitimate children of the father. The descent statute, considered by the court (Hurd's Stat. 1899, ch. 39, sec. 3) in determining whether these sons had been legitimatized, is presently incorporated within section 12 of the Probate Act. The court there held that the rights of the sons who had been born illegitimate were to be determined under the pertinent provision of the descent statute. The aforegoing authorities support the conclusion that expansion of inheritance rights of an illegitimate child in the estate of the father who dies intestate must be left to legislative modification. Therefore consideration of the applicability of the common law to intestate succession is of no relevance. *Campbell* v. *McLain* (1925), 318 Ill. 610, 612-13.

Petitioners and *amicus* urge that the statutory scheme which precludes the inheritance by an acknowledged illegitimate from the estate of the intestate father violates the Federal and State constitutional provisions guaranteeing equal protection and due process of law. In so arguing petitioners and *amicus* recognize the possible adverse implications of the United States Supreme Court decision in *Labine* v. *Vincent* (1971), 401 U.S. 532, 28 L. Ed. 2d 288, 91 S. Ct. 1017.

In *Labine* v. *Vincent* the acknowledged illegitimate child had been precluded under Louisiana law from inheriting on an equal basis with legitimate children, if the father died intestate. It was argued that this statutory limitation was contrary to Federally secured rights to equal protection and due process. In a 5-to-4 decision the Supreme Court rejected these claims, stating that "the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules."

(401 U.S. 532, 537, 28 L. Ed. 2d 288, 293, 91 S. Ct. 1017, 1020.) The Supreme Court further concluded that Louisiana's intestate succession laws had not created "an insurmountable barrier" to the acknowledged illegitimate child inheriting from the father. Alternatives existed, such as the execution of a will or marriage to the child's mother, which would have obviated the bar to the inheritance. As later explained, *Labine* v. *Vincent* "reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders. * * * The Court has long afforded broad scope to state discretion in this area." *Weber* v. *Aetna Casualty & Surety Co.* (1972), 406 U.S. 164, 170, 31 L. Ed. 2d 768, 776, 92 S. Ct. 1400.

Under traditional concepts of Federal equal protection a legislative classification will be upheld if it bears a rational relationship to a valid governmental purpose and the burden of rebutting the presumptive validity of the classification rests upon the party challenging its constitutionality. (*People* v. *Sherman* (1974), 57 Ill.2d 1, 4.) When the classification, however, affects fundamental rights (see *Hoskins* v. *Walker* (1974), 57 Ill.2d 503, 508) or involves a "suspect classification" (*People* v. *Ellis* (1974), 57 Ill.2d 127, 131), the burden is placed upon the State to demonstrate that the distinction is justified by a compelling governmental interest.

Petitioners and *amicus* expend much effort in attempting to refute the present application of *Labine* v. *Vincent*. They maintain that the rational bases suggested in that opinion to justify the classification cannot be applied in these cases. They also urge that other Supreme Court decisions have eroded the validity of that decision.

The Supreme Court noted that Louisiana's intestate succession scheme was rationally based on its interests to encourage family relationships and to establish a method of property disposition. (*Labine* v. *Vincent*, 401 U.S. 532, 536 n.6, 28 L. Ed. 2d 288, 292 n.6, 91 S. Ct. 1017, 1019 n.6.) Petitioners and *amicus* argue that Illinois statutes fail to disclose this State's interest in the promotion of family relationships as did the Louisiana statute.

We cannot accept this hypothesis. And we do not believe that Illinois has any lesser interest than Louisiana in regulating the transfer of a decedent's property in its jurisdiction. It is our opinion that petitioners and *amicus* have failed to detract from the impact of *Labine* v. *Vincent* in these regards.

Several Supreme Court decisions have been cited whose thrust is said to have severely lessened the present vitality of *Lavine* v. *Vincent*. Petitioners and *amicus* cite *Levy* v. *Louisiana* (1968), 391 U.S. 68, 20 L. Ed. 2d 436, 88 S. Ct. 1509, which invalidated a State law precluding illegitimate children from seeking a recovery for the wrongful death of their mother when such an action could be maintained by legitimate children; and *Glona* v. *American Guarantee & Liability Insurance Co.* (1968), 391 U.S. 73, 20 L. Ed. 2d 441, 88 S. Ct. 1515, which nullified a statute that had been construed as prohibiting the mother of an illegitimate child from maintaining an action for his wrongful death. The Supreme Court, however, expressly found that the rationale of its prior decisions in *Levy* and *Glona* did not extend to the situation presented in *Labine* v. *Vincent*, 401 U.S. 532, 535, 28 L. Ed. 2d 288, 292, 91 S. Ct. 1017, 1019. Petitioners and *amicus* further cite *Weber* v. *Aetna-Casualty & Surety Co.* (1972), 406 U.S. 164, 31 L. Ed. 2d 768, 92 S. Ct. 1400, which held that a dependent unacknowledged illegitimate child could not be deprived of workmen's compensation benefits accruing to dependent legitimate children as a result of the death of the natural father; *Gomez* v. *Perez* (1973), 409 U.S. 535, 35 L. Ed. 2d 56, 93 S. Ct. 872, which precluded a State from denying relief to an illegitimate child seeking support from his natural father when such relief was afforded to a legitimate child; *New Jersey Welfare Rights Organization* v. *Cahill* (1973), 411 U.S. 619, 36 L. Ed. 2d 543, 93 S. Ct. 1700, which voided certain statutory provisions of a State-aid program to poor families limiting benefits to married couples with minor children, thereby, in effect, denying benefits to illegitimate children; and *Jimenez* v. *Weinberger* (1974), 417 U.S. 628, 41 L. Ed. 2d 363, 94 S. Ct. 2496, which held unconstitutional a statutory pro-

gram denying benefits to illegitimate children born after the onset of the parent's disability, while permitting benefits to illegitimate children who were similarly born, if the latter group of children could inherit under State intestacy laws, could be legitimated under State law or were considered illegitimate only as a result of a formal defect in their parents' marriage.

We have examined these decisions and do not find the constitutional impact of *Labine* v. *Vincent* to have been lessened. As previously set forth, *Weber* v. *Aetna Casualty & Surety Co.* explained *Labine* v. *Vincent*, and expressed no dissatisfaction with that decision.

In asserting that the present Illinois classification of illegitimates is violative of Federal constitutional principles, petitioners and *amicus* recommend that this court apply the stricter equal protection test which would require the State to justify the classification by a compelling governmental interest. It is claimed that the present classification is racially and sexually discriminatory and that illegitimacy is itself a suspect classification, thereby necessitating application of the stricter constitutional standard.

In support of the position that the statutory framework is racially discriminatory, petitioner in cause No. 47092 sets forth various statistical sources which she says indicate that an excessively disproportionate share of illegitimate children were born to blacks and other minorities as compared to Caucasians. In light of these statistics this petitioner concludes that section 12 of the Probate Act has evolved to the extent that it "fits into a pattern of legislation which often is only a thinly disguised cover for racial discrimination." A comparable claim of racial discrimination, predicated on similar statistics, was presented by the *amicus* in *Labine* v. *Vincent* with no apparent success. Moreover, section 12 of the Probate Act does not contain any racial classification and affects all members of the class of illegitimates without regard to racial heritage. Such a statute, without more, would not appear in and of itself to substantiate a claim that it is racially discriminatory merely because the bare statistical possibility exists that at any given

time it could incidentally tend to affect to a greater extent a particular racial group within the general class. The alleged deprivation of which petitioner complains is remedied through the simple expedient of testamentary disposition by means of a will. And no claim is advanced that any racial group is restricted in any judicially cognizable manner from utilizing this procedure.

The argument that section 12 sexually discriminates so as to give rise to a stricter approach to Federal equal protection principles is also unpersuasive. We are cognizant of the recent decision wherein the Supreme Court struck down a Social Security provision which had precluded survivor's benefits to an unemployed widower who remained at home to care for his minor child, while permitting such payments to a similarly situated widow. The court there held that this classification was not rational under the statute's intended purpose. (*Weinberger* v. *Wiesenfeld* (1975), —— U.S. ——, 43 L. Ed. 2d 514, 95 S. Ct. 1225.) However, while the claim is made that a classification by sex requires a more stringent application of equal protection principles, we find that only four members of the Supreme Court have accepted this position. (*Frontiero* v. *Richardson* (1973), 411 U.S. 677, 36 L. Ed. 2d 583, 93 S. Ct. 1764 (plurality opinion); see also *Stanton* v. *Stanton* (1975), —— U.S. ——, 43 L. Ed. 2d 688, 95 S. Ct. 1373; *Schlesinger* v. *Ballard* (1975), —— U.S. ——, 42 L. Ed. 2d 610, 95 S. Ct. 572 (Brennan, J., dissenting); *Kahn* v. *Shevin* (1974), 416 U.S. 351, 40 L. Ed. 2d 189, 94 S. Ct. 1734 (Brennan, J., dissenting).) We are unwilling to decide that all classifications based upon sex require that the State establish a compelling governmental interest under the Federal equal protection clause.

No decision has been cited in which a classification based on illegitimacy has been expressly held to be a suspect classification. Rather the decisions concerning illegitimacy previously set forth would seem to have been determined on whether or not the classification could be said to be predicated on a rational basis. In *Jimenez* v. *Weinberger* (1974), 417 U.S. 628, 41 L. Ed. 2d 363, 94 S. Ct. 2496, the Supreme Court stated it need not reach

the argument as to whether a stricter equal protection standard was applicable in order to determine the validity of a classification premised on illegitimacy. Moreover, the *amicus* brief filed in *Labine* v. *Vincent* suggests the argument was advanced that stricter equal protection principles be utilized when examining a classification based on illegitimacy. Thus for several of the comparable reasons expressed in our discussion of the issues regarding alleged race and sex discrimination stemming from application of section 12 of the Probate Act, we are unable to presently conclude that a classification based on illegitimacy is a suspect classification under Federal constitutional interpretation.

The precise issue set forth in *Labine* v. *Vincent* is present in these appeals, *i.e.*, can an acknowledged illegitimate be treated differently than a legitimate child and thereby, in effect, be precluded from sharing in its father's estate by State laws governing intestate succession. In each of these specific appeals no "insurmountable barrier" to Mary Sodermark and Margaret Marie Collins sharing in their fathers' estates has been created. In both instances the deceased fathers apparently lived for a substantial number of years. Since Louis Karas was survived by his spouse, he could have devised as much as two thirds of his estate to Mary Sodermark. (Ill. Rev. Stat. 1973, ch. 3, par. 16; see *Montgomery* v. *Michaels* (1973), 54 Ill.2d 532, 534-5.) Because Robert Woods had no surviving spouse, he could have left his entire estate to Margaret Marie Collins if he had utilized the simple formalities of a will.

We further recognize that the State maintains an interest in prohibiting spurious claims against an estate. The parties to these appeals tend to agree that proof of a lineal relationship is more readily ascertainable when dealing with maternal ancestors. It is suggested that proof of paternal relationship may not be so readily ascertainable but that such considerations should be decided individually on the facts of each case. While establishing paternity in a proceeding to determine heirship is possible, situations may arise which are fraught with fraudulent circumstances. There exists the possibility that an

illegitimate "grandson" may seek to inherit from his "grandfather" who dies not only intestate but also after the death of his own son and without knowledge of the existence of the illegitimate. Similar circumstances might also arise in which illegitimates, claiming a collateral relationship, would seek rights to the estates of paternal intestate kindred. (See generally *Gregory* v. *County of LaSalle* (1968), 91 Ill. App. 2d 290.) There also may be situations in which a "father's" testamentary disposition is challenged on behalf of an illegitimate child who was born after the will was executed, thereby possibly permitting the child to recover a share of the estate equivalent to that allowed if the "father" had died intestate. Ill. Rev. Stat. 1973, ch. 3, par. 48; 2 Homer, Probate Practice and Estates sec. 1331 (4th ed. 1960).

In summary, to accept the numerous arguments raised by petitioners and *amicus* in regard to Federal equal protection principles would result in this court's placing strictures on *Labine* v. *Vincent*. "But, of course, a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court [United States Supreme Court] specifically refrains from imposing them." (Emphasis in original.) *Oregon* v. *Haas* (1975), —— U.S. ——, ——, 43 L. Ed. 2d 570, 576, 95 S. Ct. 1215, 1219.

There remains the contention that section 12 of the Probate Act is unconstitutional because it violates State constitutional guarantees that "equal protection of the laws shall not be denied or abridged on account of sex ***." (Ill. Const. (1970), art. I, sec. 18.) In *People* v. *Ellis* (1974), 57 Ill.2d 127, 132-33, we construed this provision as rendering any classification based on sex to be a "suspect classification," thus subjecting it to "strict judicial scrutiny" and requiring the existence of a compelling State interest to justify the classification. See also *Phelps* v. *Bing* (1974), 58 Ill.2d 32.

Petitioner in cause No. 47092 first claims that section 12(4) of the Probate Act discriminates against the father and his descendants when his illegitimate child dies intestate leaving no spouse or descendants. If this situation occurs, petitioner says the father and his descend-

ants are precluded from sharing in the child's estate while the mother and her descendants may share in the estate. A comparable attack is made upon sections 12(5) to 12(7), which generally concern inheritance from the estate of an illegitimate by maternal kindred while omitting consideration of paternal kindred. Petitioner also maintains that section 12 requires a mother to draw a will in order to disinherit her children while a father of an illegitimate child, who is not legitimized by the procedures of section 12, need not do so. Conversely, if the father of the illegitimate wishes the illegitimate child to share in his estate he must execute a will, whereas the mother need not resort to this course of action. Finally, petitioner argues that she is injured by limiting her inheritance to the estate of her mother who dies intestate or her maternal ancestors and by precluding her inheritance from her father or his ancestors. She claims that she should either inherit from both or inherit from neither, and she concludes that as a result of section 12 of the Probate Act she is injured by the sexual discrimination against each of her parents.

No contention is asserted that section 12 of the Probate Act results in any sexual discrimination as between similarly situated males and females who seek inheritance from the estates of their fathers or other paternal kindred. Under section 12 no discrimination inures to an illegitimate as a result of the illegitimate's sex. The question therefore presented in whether under these circumstances one may assert a claim of discrimination based upon the sex of another person pursuant to section 18 of article I of the State Constitution.

In our decisions of *Ellis* and *Bing* the individuals were treated differently on the basis of their sex because of classifications in the Juvenile Court Act and Marriage Act. Neither case involved a situation wherein the affected individuals asserted a constitutional deprivation based solely on the sex of another person, as in these appeals. The official explanation of section 18 of article I recites that "no government in Illinois may deny equal protection of the law to anyone because of his or her sex." (7 Record of Proceedings, Sixth Illinois Constitutional

Convention 2688.) This explication indicates that State constitutional issues raising questions of classifications based on sexual differentiation may be raised by individuals who are thereby affected as a result of their own sex. For this reason, we are of the opinion that petitioner's State constitutional claim is without merit.

Amicus argues that both parents have a duty to support a child and if one parent dies the survivor's duty is necessarily increased. *Amicus* says that section 12 invidiously discriminates against the surviving mother in preference to the surviving father of the illegitimate child. It is argued that the father is aided in his obligation of support because the child may inherit from the mother. Conversely, they argue, the mother is not aided and, in fact, is burdened, for the child cannot inherit from the father and support from the father is no longer available. *Amicus* concludes that section 12 "discriminates against women by failing to provide for their children a legal right of inheritance equivalent to that granted to the children of surviving male parents." To buttress this argument *amicus* refers only to sections 9 and 11 of the Probate Act (ch. 3, pars. 9 and 11), which *amicus* asserts are designed to prevent a decedent's closest relatives from becoming wards of the State.

We have examined these provisions and are unable to interpret these sections as intending to create a statutory scheme for financial support. Section 9, in pertinent part, merely says that the Probate Act shall be liberally construed. Section 11 establishes an intestate succession for the devolution of property not involving illegitimates. There is no basis evident from the language employed in either section which permits an interpretation that these provisions were intended to alleviate the possibility that certain close relatives of the decedent would seek public assistance. Obviously the application of section 11 provides the basis wherein certain relatives may assure their living standard or even elevate it by their inheritance. But this provision also allows inheritance to wealthy relations to the exclusion of impoverished individuals who may be only slightly more remote in their relationship to the decedent. Moreover, relations of equal degree sim-

ilarly inherit even though there may exist extreme divergence in their financial status.

Having concluded that the petitioners were not denied equal protection of the law, we do not find that they were deprived of due process of law by the trial courts' refusals to permit a hearing wherein they might seek to establish the paternity of the decedents. *Cf. Stanley* v. *Illinois* (1972), 405 U.S. 645, 31 L. Ed. 2d 551, 92 S. Ct. 1208.

There remains the contention advanced by petitioner in cause No. 47092 that she has a preference in issuance of letters of administration as set forth in section 96(2) of the Probate Act (ch. 3, par. 96(2)). In determining that petitioner may not inherit from her father under the circumstances presented in this case, we do not believe it logical that she should be allowed to participate in the administration of his estate. See *Myatt* v. *Myatt* (1867), 44 Ill. 473, 476.

Accordingly, the judgment of the appellate court in cause No. 46986 is affirmed. The judgment of the circuit court of Cook County in cause No. 47092 is affirmed.

Judgments affirmed.

11. Opinion of Court, Orally Delivered

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
) ss.
SUPREME COURT)

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the following remarks were made by CHIEF JUSTICE UNDERWOOD at the end of the oral argument on September 24, 1975, in case No. 47339—Deta Mona Trimble, et al., appellants, vs. Joseph Roosevelt Gordon, et al., appellees:

> "CHIEF JUSTICE UNDERWOOD: Counsel, I think it will not be necessary to hear further argument. The Court has concluded that *Karas* is dispositive of the matter and it is the judgment of the Court that the judgment of the circuit court of Cook County is affirmed."

IN WITNESS WHEREOF, I have hereunto subscribed my name and affixed the Seal of said Court this 19th day of November, A.D. 1975.

/s/ Clell L. Woods
Clerk
Supreme Court of the State of Illinois

12. WRITTEN ORDER (DECISION) OF ILLINOIS SUPREME COURT

UNITED STATES OF AMERICA

STATE OF ILLINOIS)
) ss.
SUPREME COURT)

At a Term of the Supreme Court, begun and held in Springfield, on Monday, the eighth day of September in the year of our Lord, one thousand nine hundred and seventy-five, within and for the State of Illinois.

PRESENT: ROBERT C. UNDERWOOD, CHIEF JUSTICE
JUSTICE WALTER V. SCHAEFER
JUSTICE DANIEL P. WARD
JUSTICE JOSEPH H. GOLDENHERSH
JUSTICE THOMAS E. KLUCZYNSKI
JUSTICE CHARLES H. DAVIS
JUSTICE HOWARD C. RYAN
WILLIAM J. SCOTT, ATTORNEY GENERAL
WILLIAM G. LYONS, MARSHAL
ATTEST: CLELL L. WOODS, CLERK

Be It Remembered, that, to-wit: on the 24th day of September 1975, the same being one of the days of the term of Court aforesaid, the following proceedings were, by said court, had and entered of record, to-wit:

No. 47339

DETA MONA TRIMBLE AND JESSIE TRIMBLE, APPELLANTS

vs.

JOSEPH ROOSEVELT GORDON, ETHEL MAE KING, WILLIAM GORDON, HELLIE MAE GORDEY, AND MARY LOIS GORDON, APPELLEES

APPEAL FROM CIRCUIT COURT COOK COUNTY 74 P 5902

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

THEREFORE, it is considered by the Court that the judgment of the Circuit Court of Cook County aforesaid, BE AFFIRMED IN ALL THINGS AND STAND IN FULL FORCE AND EFFECT, notwithstanding the said matter and things therein assigned for error. And it is further considered by the Court that the said appellees recover of and from the said appellants costs by them in this behalf expended, to be taxed, and that they have execution therefor.

I, CLELL L. WOODS, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing

is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 15th day of October, 1975.

[SEAL]

/s/ Clell L. Woods
Clerk
Supreme Court of the State of Illinois

13. ORDER OF ILLINOIS SUPREME COURT STAYING MANDATE

IN THE SUPREME COURT OF ILLINOIS

No. 47339

IN RE ESTATE OF SHERMAN GORDON, Deceased
DETA MONA TRIMBLE, AND JESSIE TRIMBLE,
PETITIONERS-APPELLANTS

—*vs*—

JOSEPH ROOSEVELT GORDON, ETHEL MAE KING, WILLIAM GORDON, HELLIE MAE GORDEY, AND MARY LOIS GORDON, RESPONDENTS-APPELLEES

ORDER

This matter coming before the court on the motion of DETA MONA TRIMBLE and JESSIE TRIMBLE, Petitioners-Appellants herein, it is hereby ordered that the mandate of this court, issued to the Clerk of the Circuit Court of Cook County on October 15, 1975, be and is hereby recalled and stayed, pending resolution of the petitioners' application of review of the judgment herein by the Supreme Court of the United States, which application will be promptly made.

/s/ Daniel P. Ward

DATED: Oct. 21-75

Devereux Bowly and Charles Linn
Attorneys for Petitioners-Appellants
Legal Assistant Foundation of Chicago
911 S. Kedzie Avenue
Chicago, IL 60612
638-2343

14. NOTICE OF APPEAL TO UNITED STATES SUPREME COURT

IN THE SUPREME COURT OF ILLINOIS

No. 47339

IN RE ESTATE OF SHERMAN GORDON, Deceased
DETA MONA TRIMBLE, AND JESSIE TRIMBLE,
PETITIONERS-APPELLANTS

vs.

JOSEPH ROOSEVELT GORDON, ETHEL MAE KING, WILLIAM GORDON, HELLIE MAE GORDEY, AND MARY LOIS GORDON, RESPONDENTS-APPELLEES

NOTICE OF APPEAL

Appellants, DETA MONA TRIMBLE and JESSIE TRIMBLE, appeal to the Supreme Court of the United States from the final judgment of this court entered September 24, 1975, affirming the judgment of the Circuit Court of Cook County declaring DETA MONA TRIMBLE not the heir at law of SHERMAN GORDON, and thus denying her any part of his estate.

This appeal is taken pursuant to 28 U.S.C. § 1257 (2). The basis of the decision against appellants was Illinois Revised Statutes, Chapter 3, entitled "ADMINISTRATION OF ESTATES," Section 12, entitled "Illegitimates." Appellants at all times claimed that the said statute was in violation of the Fourteenth Amendment to the Constitution of the United States. The final

judgment from which the appeal is taken is in favor of the validity of said statute.

Respectfully submitted,

_____

One of the attorneys for
Appellants

Devereux Bowly and Charles Linn
Legal Assistance Foundation of Chicago
911 S. Kedzie Avenue
Chicago, Illinois 60612
638-2343 (312)

James Weill and Jane G. Stevens
Legal Assistance Foundation of Chicago
343 S. Dearborn Street
Chicago, Illinois 60604

John Henry Schlegel
Faculty of Law Jurisprudence
State University of New York at Buffalo
John Lord O'Brian Hall
Buffalo, New York 14260

(Notice of filing and Certificate of Service omitted in printing)

SUPREME COURT OF THE UNITED STATES

No. 75-5952

DETA MONA TRIMBLE AND JESSIE TRIMBLE, APPELLANTS,

v.

JOSEPH ROOSEVELT GORDON, ET AL.

ON CONSIDERATION of the motion for leave to proceed herein *in forma pauperis*,

IT IS ORDERED by this Court that the said motion be, and the same is hereby, granted.

March 22, 1976

SUPREME COURT OF THE UNITED STATES

No. 75-5952

DETA MONA TRIMBLE AND JESSIE TRIMBLE, APPELLANTS,

v.

JOSEPH ROOSEVELT GORDON, ET AL.

APPEAL from the Supreme Court of the State of Illinois.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted.

March 22, 1976

☆ U. S. GOVERNMENT PRINTING OFFICE: 1976 205190 242

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-5952

IN RE ESTATE OF SHERMAN GORDON,
Deceased,

DETA MONA TRIMBLE, and
JESSIE TRIMBLE,

Appellants,

VS.

JOSEPH ROOSEVELT GORDON, -
ETHEL MAE KING, Mother
WILLIAM GORDON,
HELLIE MAE GORDEY,
and MARY LOIS GORDON,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF ILLINOIS

MOTION TO AFFIRM OR DISMISS

Fred Klinsky,
Attorney-at-Law
188 West Randolph Street
Chicago, Illinois 60601

Attorneys for Appellee Ethel King

February 27, 1976

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

NO. 75-5952

IN RE ESTATE OF SHERMAN GORDON,
Deceased,

DETA MONA TRIMBLE, and
JESSIE TRIMBLE,

Appellants,

VS.

JOSEPH ROOSEVELT GORDON,
ETHEL MAE KING,
WILLIAM GORDON,
HELLIE MAE GORDEY,
and MARY LOIS GORDON,

Appellees.

ON APPEAL FROM THE
SUPREME COURT OF ILLINOIS

MOTION TO AFFIRM OR DISMISS

Appellee Ethel King, defendant in the above action moves pursuant to Rule 16 of the Rules of this Court that the final judgment of the Supreme Court of Illinois be affirmed or, in the alternative, that this appeal be dismissed.

OPINION BELOW

The Illinois Supreme Court issued no written opinion in this cause. In an oral opinion the Illinois Supreme Court ruling from the bench, stated its decision here was based upon the case of In re Estate of Louis Karas, 61 Ill.2d 40 (June 2, 1975). A copy of said decision is attached hereto as Appendix A.

JURISDICTION

Appellant invokes the jurisdiction of this Court under 28, United States Code, Section 1257(2).

THE STATUTE INVOLVED

The statute involved in this suit, Illinois Revised Statutes, Ch. 3, Sec. 12, final paragraph (which is the portion of the statute that relates to illegitimate children):

> An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents intermarry and who is acknowledged by the father as the father's child is legitimate.

QUESTIONS PRESENTED

Does the constitutionality of Section 12 of the Illinois Probate Act which creates a different scheme of inheritance for illegitimate children than for legitimate or legitimated children raise a question not passed on requiring a plenary review by this Court?

STATEMENT OF FACTS

This case involves the question of whether the illegitimate child of a man who died intestate is his heir for inheritance purposes. Sherman Gordon, a 28 year old resident of Chicago, died May 23, 1974, leaving no will. He was the victim of a homicide. His estate consisted of a 1974 Plymouth automobile, having a value of approximately $2,500. He died leaving no spouse, and appelant Deta Mona Trimble, 3 years old at the time of death, as his only descendent.

Appellant Jessie Trimble is a 30 year old woman residing in Chicago. She and Sherman Gordon lived together with their child, Deta Mona Trimble, from 1970 until his death, but they never intermarried. On January 2, 1973, the Circuit Court of Cook County, Illinois, entered an order, in the case of Jessie Trimble v. Sherman Gordon, 72 MC1-J846169, finding said Sherman Gordon to be the father of Deta Mona Trimble, and ordering him to pay $15 per week for her support. Sherman Gordon in his day-to-day activities publicly acknowledged Deta Mona Trimble as his child, and supported her pursuant to the said paternity order.

On July 25, 1974, Deta Mona Trimble, by her mother and next best friend, Jessie Trimble, filed a Petition for Letters of Administration, Determination of Heirship and Declaratory Relief in the Circuit Court of Cook County, Illinois. That court heard arguments as to the unconstitutionality of Illinois Revised Statutes, Ch. 3, Sec. 12, as it applies to illegitimate children, and also heard evidence as to the heirs of decedent Sherman Gordon.

On September 9, 1974, the court entered the Order Declaring Heirship, which provided that the only heirs of Sherman Gordon are his father, mother, brother, two sisters, and half-brother. In so doing it was held that Deta Mona Trimble was not the heir at law of Sherman Gordon. An appeal was taken from that order. The Illinois Supreme Court entered an order allowing direct appeal, thus by-passing the Illinois Appellate Court. The Illinois Supreme Court also granted leave to appellants to file an Amicus Brief in the case of In Re Estate of Louis Karas, which was then pending before the court. In that case, and its companion case, In re Estate of Robert Woods, illegitimate children whose fathers had died intestate challenged on constitutional grounds the same statute that is challenged herein.

On June 2, 1975, the Illinois Supreme Court issued its opinion in In re Estate of Louis Karas, 61 Ill.2d 40 (1975) upholding the statute and rejecting all arguments of its unconstitutionality, including the arguments made in the Amicus Brief of Appellants herein. A copy of said decision is attached hereto as Appendix A. On September 24, 1975, oral argument was held in the instant case before the Illinois Supreme Court, and Chief Justice Underwood orally delivered the opinion of the court from the bench saying the trial court judgment was affirmed, based upon the Karas holding. On October 15, 1975, the court issued its written order, effective September 24, 1975, affirming the trial court. It is from the order dated September 24, 1975, issued October 15, 1975, that this appeal is taken. On October 21, 1975, Justice Daniel P. Ward of the Illinois Supreme Court signed an order recalling and staying the mandate issued to the Circuit Court of Cook County on October 15, 1975, pending resolution of this appeal.

ARGUMENT

NO CONSTITUTIONAL OR SUBSTANTIAL FEDERAL QUESTION IS PRESENTED ON THIS APPEAL NOT PREVIOUSLY PASSED ON REQUIRING A FULL ARGUMENT BEFORE THE COURT.

A. Labine v. Vincent, Should Control The Determination Of This Case

The question raised on this appeal is whether a State may create a classification based on illegitimacy in providing for the intestate transfer of decedent's property when such classification is rationally related to a valid state interest. This Court has previously held in Labine v. Vincent, 401 U.S. 532 (1971), that state interests in protecting family life and in regulating the disposition of property left by decedents within a state are sufficient to permit distinctions in intestate succession statutes based on illegitimacy.

Appellants have argued that the probate statutory scheme of Louisiana, La.Civ.Code Ann.,(1952), coming before the Court in Labine v. Vincent, is extremely complex and disimilar to the Illinois Probate Act, Ill.Rev.Stat.,Ch.3.,(1975), and that therefore Labine should not be controlling. Indeed the Louisiana system is based on the French, Spainish and Roman civil codes while Illinois and all other States have systems based on the English Common Law. But classifications made by Louisiana which are Constitutional under the federal Constitution must be so in all theother States. Labine approved of a probate scheme which created distinctions both among illegitimate children and between legitimate and illegitimate children. Any classification made by Section 12 of the Illinois Probate Act dividing illegitimate children into different classes based on the sex of the deceased parent for inheritance purposes, must be upheld

under Labine if any legitimate state interests are thereby furthered. The majority opinion in Labine did not even invoke the minimal scrutiny which was developed by this Court to test equal protection arguments in the main text. [1]See 401 U.S. at 536, n.6. However, the Illinois Supreme Court in In Re Karas, 61 Ill.2d 41 (1975) used the rational relationship test in basing its opinion on Labine.

> "Under traditional concepts of Federal equal protection a legislative classification will be upheld if it bears a rational relationship to a valid governmental purpose, and the burden of rebutting the presumptive validity of the classification rests upon the party challenging its constitutionality (citations omitted).
>
> ☆ ☆ ☆
>
> The Supreme Court noted that Louisiana's intestate succession scheme was rationally based on its interests to encourage family relationships and to establish a method of property disposition. (citations omitted). Petitioners and amicus argue that Illinois statutes fail to disclose this State's interest in the promotion of family relationships as did the Louisiana statutes. We cannot accept this hypothesis. And we do not believe that Illinois has any lesser interest than Louisiana in regulating the transfer of a decedant's property in its jurisdiction." In Re Karas, 61 Ill.2d 40, 47-48 (1975).

State legislatures, in the absence of specific constitutional guarantees, should be able to establish such a classification provided that it is related to a valid state purpose. It cannot be denied that the State of Illinois by seeking to avoid excess litigation, to promote the speedy disposition of property interests within the state and to protect decedent's estates from spurius claims, have such

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[1] "Even if we were to apply the 'rational basis' test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property left within the State." 401 U.S. at 536,n.6.

rational and valid interests. Since the Illinois Supreme Court has adhered to the traditional minimal scrutiny test in reviewing the statute involved, the standard in Labine has been readily met thus this appeal need not be fully argued.

B. Strict Scrutiny Is Not At Issue Since No "Fundamental Rights" Are Threatened Nor Is Illegitimacy a "Suspect Classification."

The "strict scrutiny" test cannot properly be applied to this appeal since it is evoked only where classifications effect "fundamental rights" or establish "suspect classifications"; it then requires that a "compelling governmental interest" be furthered by the classification and by the least drastic means available.[2] The Illinois Supreme Court reviewed the decisions of t[illegible] Court subsequent to Labine dealing with the issue of illegitimacy.

> "No decision has been cited in which a classification based on illegitimacy has been expressly held to be a suspect classification. Rather the decisions concerning illegitimacy previously set forth would seem to have been determined on whether or not the classification could be said to be predicated on a rational basis. In Jimenez v. Weinberger (1974),407 U.S. 628, 41 L.Ed.2d 363, 94 S.Ct. 2496, the Supreme Court stated it need not reach the argument as to whether a stricter equal protection standard was applicable in order to determine the validity of a classification premised on illegitimacy. In Re Estate of Karas, 61 Ill.2d 41,51 (1975)."

It is clear that illegitimacy is not an inherently "suspect classification" calling for rigorous scrutiny and justification by a State when included in an intestate succession statute.

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[2]San Antonio School District v. Rodriquez, 411 U.S.1, at 16-17 (1973). See also Police Department of Chicago v. Mosley, 408 U.S.92 (1972); Dunn v. Blumstein, 405 U.S.330 (1972); Shapiro v. Thompson, 394 U.S.618 (1969); Loving v. Virginia, 388 U.S.1 (1967); In re Griffith, 413 U.S.717 (1973); and Oyama v. California, 332 U.S.633 (1948).

There can be no challenge to Section 12 based on an argument that it discriminates invidiously on the basis of sex. The minor Appellant has no standing to claim that she is discriminated against based on the sex of her deceased parent since there is no sex distinction as to illegitimates who may inherit it. Nor may the mother of an illegitimate child complain that she is denied the benefits of intestate succession statute where she was not related to the decedent. Therefore no "suspect classification" is involved in this appeal.

Neither are any "fundamental rights" infringed by the operation of the statute in question.[3] There is no recognized right to inherit in Illinois since a parent is free to disinherit a child by will. Since there is no right to inherit neither can there be a right to support from the estate of a deceased parent in Illinois. Minor and dependent children do have a right to a child's allowance, Ill. Rev. Stat., Ch 3, Section 179 (1975), but this section is not now in question since the Appellant never moved the trial court to make provision for a child's allowance. Section 179, however, does not provide generally for the support of minor children but only for a nine month period following the death of a parent. It is true that had the minor Appellanr been a legitimate child she would have been able to inherit her father's entire estate since he died intestate. However, there can be no valid claim that there is present in Illinois a right for children to inherit from their fathers or to receive support from his estate for other than a nine month period, the constitutionality of which section is not now at issue. Therefore the rights involved can not be said to be "fundamental" and the strict scrutiny test is inapplicable to this appeal.

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[3] San Antonio School District v. Rodriquez, 411 U.S.1 (1973).

CONCLUSION

For the reasons set forth above, the opinion of the Illinois Supreme Court should be affirmed or in the alternative, this Appeal should be dismissed.

Respectfully submitted,

Fred Klinsky
Attorney for Appellee Ethel King

Fred Klinsky,
Attorney-at-Law
188 West Randolph Street
Suite 1227
Chicago, Illinois 60601
(312) 346-2280

Attorney for Appellee

APPENDIX A

For the reasons stated, the judgment of the appellate court is reversed, and the judgement of the circuit court of Bureau County is affirmed.

Appellate court reversed; circuit court affirmed.

Mr. Justice Ryan took no part in the consideration or decision of this case.

61 Ill.2d 40

In re ESTATE of Louis KARAS.

Mary SODERMARK, Appellant,

v.

Evangelia KARAS, Appellee.

In re ESTATE of Robert WOODS.

Margaret Marie COLLINS, Appellant,

v.

Addie WHEELER, Adm'r, Appellee.

Nos. 46986, 47092.

Supreme Court of Illinois.

June 2, 1975.

On petition to vacate a probate court order declaring that intestate left his widow surviving as his only heir at law and next of kin, the Circuit Court, Cook County, John J. Hogan, J., dismissed and decedent's illegitimate daughter appealed. The Appellate Court, 21 Ill.App.3d 564, 315 N.E.2d 603, affirmed and leave to appeal was granted. In a second proceeding, a decedent's illegitimate daughter sought letters of administration and a declaration of heirship, the Circuit Court struck and dismissed the petition, and direct appeal was granted. The appeals were consolidated. The Supreme Court, Kluczynski, J., held that the law permitting an illegitimate to inherit from the mother but not from the father is not unconstitutional.

Affirmed.

1. Bastards ⇐100

At common law, illegitimate could not inherit.

2. Constitutional Law ⇐70.1(6)

Supreme Court would not modify common law rule that acknowledged illegitimate may not be heir of intestate father's estate; expansion of inheritance rights must be left to legislative modification. S.H.A. ch. 3, § 12.

3. Constitutional Law ⇐211

For equal protection purposes, legislative classification will be upheld if it bears rational relation to valid governmental purpose and burden of rebutting presumptive validity of classification rests upon party challenging it; when classification affects fundamental right or involves suspect classification, burden is placed upon state to demonstrate that distinction is justified by compelling governmental interest.

4. Bastards ⇐101, 102

Constitutional Law ⇐208(3)

Illinois classification of illegitimates so as to permit inheritance from mother but not from father would not be tested by stricter constitutional standard requiring justification by compelling governmental interest, despite claims that classification is racially and sexually discriminatory and that illegitimacy is itself a suspect classification. S.H.A. ch. 3, § 12.

5. Bastards ⇐101, 102

Constitutional Law ⇐211

Illinois law permitting illegitimate to inherit from mother but not from father bears rational relation to valid governmental purpose and does not deny equal protection. S.H.A. ch. 3, § 12.

6. Constitutional Law ⇐42.2(1)

Questions of classification based on sexual differentiation may be raised by individuals who are thereby affected as a result of their own sex but could not be heard to challenge constitutionality of law permitting illegitimate to inherit from mother but not from father. S.H.A. ch. 3, § 12; S.H.A. Const.1970, art. 1, § 18.

7. Bastards ⇐102

Constitutional Law ⇐208(3)

Statute permitting illegitimate to inherit from mother is not unconstitutional as discriminating against surviving mother in preference to surviving father through ruling father immune from obligation of support. S.H.A. ch. 3, §§ 9, 11, 12.

8. Constitutional Law ⇐105(2)

Illegitimate children who were not denied equal protection by law prohibiting illegitimate from inheriting from intestate father were not deprived of due process by refusal to permit hearing wherein they might seek to establish paternity.

9. Executors and Administrators ⇐17(2)

Illegitimate daughter who could not inherit from her intestate father was not entitled to participate in administration of estate. S.H.A. ch. 3, § 96(2).

James R. Phelps and Wayne R. Anderson of Burditt & Calkins, Chicago, for appellant Mary Sodermark.

Mary Benedict Hooton, Chicago, for appellant Margaret Marie Collins.

Gerald W. Shea, Berwyn (Robert J. Lifton of Neistein, Richman, Hauslinger & Young, Ltd., Chicago, of counsel), for appellee Evangelia Karas.

Schwartzberg, Barnett & Schwartzberg, Goodman, Krasner & Kipnis and Zaiden, Berg, Hoffman & Schoenfeld, Chicago (Benjamin H. Cohen and Hugh J. Schwartzberg, Chicago, of counsel), for appellee Addie Wheeler.

Devereux Bowly, Charles Linn, James Weill and Jane Stevens of Legal Assistance Foundation, Chicago (John Henry Schlegel, Buffalo, N. Y., and Joseph Bonica, [illegible] Students, of counsel), for amicus curiae Dora Shaw Trimble and Jessie Trimble.

KLUCZYNSKI, Justice:

These consolidated appeals present the common issue of whether an acknowledged illegitimate child may inherit from her father who died intestate never having married the child's mother. A subsidiary issue involves the right of an illegitimate to be appointed the administrator of the estate under these circumstances.

The relevant sections of the Probate Act read as follows:

"Sec. 12. Illegitimates.

* * * * * *

An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents intermarry and who is acknowledged by the father as the father's child is legitimate." Ill.Rev.Stat.1973, ch. 3, par. 12.

"Sec. 96. Persons entitled to preference in obtaining letters.) The following persons are entitled to preference in the following order in obtaining the issuance of letters of administration * * *:

* * * * * *

(2) The children or any person nominated by them." Ill.Rev.Stat.1973, ch. 3, par. 96.

In cause No. 46986 Louis Karas died intestate. The circuit court of Cook County entered an order declaring Evangelia Karas, his widow, to be his only heir-at-law. Thereafter Mary Sodermark, petitioner, sought to vacate the order of heirship

claiming that she was the child of Louis Karas and Estelle Ross, who never married. The Sodermark petition alleged that Estelle Ross had been institutionalized for psychiatric reasons and apparently upon her release had disappeared. The petition further averred that Mary Sodermark had been acknowledged as the child of Louis Karas and that he had contributed to her support while she lived with as aunt. The petition asserted that Louis Karas and his wife, Evangelia, lived for a time with Mary Sodermark, her husband and family and that Louis Karas had contributed a downpayment to the purchase of the Sodermark's house. The circuit court granted Evangelia's motion to strike and dismiss the Sodermark petition. The appellate court affirmed (In re Estate of Karas, 21 Ill.App.3d 564, 315 N.E.2d 603), and we granted leave to appeal.

In cause No. 47092 Robert Woods died intestate at the age of 81. He left no surviving spouse and no legitimate children or descendants thereof. The circuit court of Cook County determined that there existed certain collateral heirs-at-law of the deceased. Margaret Marie Collins, petitioner, then attempted to obtain letters of administration and a declaration of heirship on her behalf. She asserted in her petition that she was the acknowledged illegitimate daughter of the deceased and a lawful heir to his $37,000 estate. The circuit court sustained the motion of certain collateral heirs-at-law to strike and dismiss the Collins' petition, and we granted direct appeal (50 Ill.2d R. 302(b), Ill.Rev.Stat.1973, ch. 110A, § 302(b)).

We have permitted the filing of an *amicus* brief in these consolidated cases. The *amicus* has pending in this court a direct appeal involving similar issues. (In re Estate of Gordon, No. 47339.) The illegitimate in *Gordon* is a minor. *Amicus* asserts that prior to the death of the unmarried father there had been a judicial order adjudicating paternity and ordering that he support this child.

As accepted by the motions to strike and dismiss the petitions, for the purpose of these appeals Mary Sodermark and Margeret Marie Collins are the acknowledged illegitimate children of the respective decedents, who never married the natural mothers. (Gertz v. Campbell (1973), 55 Ill.2d 84, 87, 302 N.E.2d 40). Thus they have not been legitimatized in accord with section 12 of the Probate Act, and under prior case law (Krupp v. Sackwitz (1961), 30 Ill.App.2d 459, 174 N.E.2d 877, appeal denied, 21 Ill.2d 621) are not considered heirs of their fathers, who died intestate.

[1] At common law an illegitimate could not inherit. (Blacklaws v. Milne (1876), 82 Ill. 505, 506.) By statute the result of this rule was ameliorated. (Ill. Ann.Stat., ch. 3, sec. 12, Historical Note, at 64 (Smith-Hurd 1961); see also 2 Horner, Probate Practice and Estates, secs. 1348, 1350–51 (4th ed. 1960).) In Smith v. Garber (1918), 286 Ill. 67, 121 N.E. 173, the court, in discussing the predecessor provisions of section 12 of the Probate Act, stated:

"'Sections 2 and 3 of our statute of descent were enacted for the purpose of obviating the undue severity of the common law and of erecting a rule more consonant with justice to an innocent and unfortunate class. Section 2 * * * abrogates the common law rule that an illegitimate is the child of nobody, and could not take property by inheritance, even from its own mother.' (Robinson v. Ruprecht, 191 Ill. 424, 61 N.E. 631.) Under the common law an illegitimate was considered *filius nullius*. 1 Blackstone's Com. *459. Under the statutes passed in this state in relation to illegitimate children, 'an illegitimate person is recognized as the child of his mother, as regards the descent of property.' Miller v. Williams, 66 Ill. 91. In Bales v. Elder, 118 Ill. 436, 11 N.E. 421, this court said that it was the purpose of the legislature in enacting the statute as to illegitimate children to remove the common law disability of inheritance and place them more nearly on a level with legitimates. See, also, Jenkins v. Deane, 121 Ill. 217, 12 N.E. 684; Chambers v. Chambers, 249 Ill. 126 [239 Ill. 136, 94 N.E. 198].) In Robinson v. Ruprecht, *supra*, this court said (191 Ill. p. 433 [61 N.E.[631] 634]): 'The rule [of the common law] visited the sins of the parents upon the unoffending offspring, and could not long survive the true sense of justice and liberal sense of charity that came with the advancing enlightenment and civilization of the race.' [Ill. 62, 70–71, 121 N.E. 173, 175.

[2] It is argued in the Sodermark appeal that this court modify the common law rule that an acknowledged illegitimate may not be an heir of the intestate father's estate. She urges that she be allowed to inherit to the extent of a legitimate child. This is not a tenable argument.

For nearly 150 years this State by statute has mitigated the effect of the common law rule prohibiting inheritance by illegitimates. While discussing other Probate Act provisions, this court has held that "The regulation of the descent of property and of the right to devise property, as well as the method of conveying and the manner of creating estates and the character and quality of estates created, is purely statutory and entirely within the control of the Legislature. [Citations.] Being wholly statutory, the rules of descent may be changed by the Legislature in its discretion and conditions or burdens may be imposed upon the right of succession." (Stelzhagen v. Trull (1926), 320 Ill. 382, 387, 151 N.E. 250, 252, see also Jahnke v. Selle (1938), 368 Ill. 268, 271, 13 N.E.2d 984.) Moreover, Miller v. Pennington (1915), 268 Ill. 220, 75 N.E. 919, involved litigation contesting certain property of the intestate decedent. He had fathered two illegitimate sons by a woman whom he subsequently married. The question presented concerned whether these sons could be declared to be legitimatized and could therefore share as heirs at law with the other legitimate children of the father. The descent statute, considered by the court (Hurd's Rev.Stat.1879, ch. 39, sec. 5) in determining whether these sons had been legitimatized, is presently incorporated within section 12 of the Probate Act. The court there held that the rights of the sons who had been born illegitimate were to be determined under the pertinent provision of the descent statute. The aforegoing authorities support the conclusion that expansion of inheritance rights of an illegitimate child in the estate of the father who dies intestate must be left to legislative modification. Therefore consideration of the applicability of the common law to intestate succession is of no relevance. Campbell v. McLain (1975), 318 Ill. 600, 612-13, 149 N.E. 481.

Petitioners and *amicus* urge that the statutory scheme which precludes the inheritance by an acknowledged illegitimate from the estate of the intestate father violates the Federal and State constitutional provisions guaranteeing equal protection and due process of law. In so arguing petitioners and *amicus* recognize the possible adverse implications of the United States Supreme Court decision in Labine v. Vincent (1971), 401 U.S. 532, 91 S.Ct. 1917, 28 L.Ed.2d 288.

In Labine v. Vincent the acknowledged illegitimate child had been precluded under Louisiana law from inheriting on an equal basis with legitimate children, if the father died intestate. It was argued that this statutory limitation was contrary to Federally secured rights to equal protection and due process. In a 5-to-4 decision the Supreme Court rejected these claims, stating that "the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this

Court believe that they can provide better rules." (401 U.S. 532, 537, 91 S.Ct. 1017, 1020, 28 L.Ed.2d 288, 293). The Supreme Court further concluded that Louisiana's intestate succession laws had not created "an insurmountable barrier" to the acknowledged illegitimate child inheriting from the father. Alternatives existed, such as the execution of a will or marriage to the child's mother which would have obviated the bar to the inheritance. As later explained, Labine v. Vincent "reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders. • • • The Court has long afforded broad scope to state discretion in this area." Weber v. Aetna Casualty & Surety Co. (1972), 406 U.S. 164, 179, 92 S.Ct. 1400, 1409, 31 L.Ed.2d 768, 776.

[3] Under traditional concepts of Federal equal protection a legislative classification will be upheld if it bears a rational relationship to a valid governmental purpose, and the burden of rebutting the presumptive validity of the classification rests upon the party challenging its constitutionality. (People v. Sherman (1974), 57 Ill.2d 1, 4, 309 N.E.2d 562.) When the classification, however, affects fundamental rights (see Hoskins v. Walker (1974), 57 Ill.2d 503, 506, 313 N.E.2d 25), or involves a "suspect classification" (People v. Ellis (1974), 57 Ill.2d 127, 131, 311 N.E.2d 98), the burden is placed upon the State to demonstrate that the distinction is justified by a compelling governmental interest.

Petitioners and *amicus* expend much effort in attempting to refute the present application of Labine v. Vincent. They maintain that the rational bases suggested in that opinion to justify the classification cannot be applied in these cases. They also urge that other Supreme Court decisions have eroded the validity of that decision.

The Supreme Court noted that Louisiana's intestate succession scheme was rationally based on its interests to encourage family relationships and to establish a method of property disposition. (Labine v. Vincent, 401 U.S. 532, 536 n. 6, 91 S.Ct. 1017, 1019 n. 6, 28 L.Ed.2d 288, 292 n. 6.) Petitioners and *amicus* argue that Illinois statutes fail to disclose this State's interest in the promotion of family relationships as did the Louisiana statutes. We cannot accept this hypothesis. And we do not believe that Illinois has any lesser interest than Louisiana in regulating the transfer of a decedent's property in its jurisdiction. It is our opinion that petitioners and *amicus* have failed to detract from the impact of Labine v. Vincent in these regards.

Several Supreme Court decisions have been cited whose thrust is said to have severely lessened the present vitality of Labine v. Vincent. Petitioners and *amicus* cite Levy v. Louisiana (1968), 391 U.S. 68, 88 S.Ct. 1509, 20 L.Ed.2d 436, which invalidated a State law precluding illegitimate children from seeking a recovery for the wrongful death of their mother when such an action could be maintained by legitimate children, and Glona v. American Guarantee & Liability Insurance Co. (1968), 391 U.S. 73, 88 S.Ct. 1515, 20 L.Ed.2d 441, which nullified a statute that had been construed as prohibiting the mother of an illegitimate child from maintaining an action for his wrongful death. The Supreme Court, however, expressly found that the rationale of its prior decisions in *Levy* and *Glona* did not extend to the situation presented in Labine v. Vincent, 401 U.S. 532, 535, 91 S.Ct. 1017, 1019, 28 L.Ed.2d 288, 292. Petitioners and *amicus* further cite Weber v. Aetna Casualty & Surety Co. (1972), 406 U.S. 164, 92 S.Ct. 1400, 31 L.Ed.2d 768, which held that a dependent unacknowledged illegitimate child could not be deprived of workmen's compensation benefits accruing to dependent legitimate children as a result of the death of the natural father; Gomez v. Perez (1973), 409 U.S. 535, 93 S.Ct. 872, 35 L.Ed.2d 56, which precluded a State from denying re-

lief to an illegitimate child seeking support from his natural father when such relief was afforded to a legitimate child; New Jersey Welfare Rights Organization v. Cahill (1973), 411 U.S. 619, 93 S.Ct. 1709, 36 L.Ed.2d 543, which voided certain statutory provisions of a State aid program to families limiting benefits to married couples with minor children, thereby, in effect, denying benefits to illegitimate children; Jimenez v. Weinberger (1974), 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363, which held unconstitutional a statutory program denying benefits to illegitimate children born after the onset of the parent's disability, while permitting benefits to illegitimate children who were similarly born, if the latter group of children could inherit under State intestacy laws, could be legitimated under State law or were considered illegitimate only as a result of a formal defect in their parents' marriage.

We have examined these decisions and do not find the constitutional impact of Labine v. Vincent to have been lessened. As previously set forth, Weber v. Aetna Casualty & Surety Co. explained Labine v. Vincent, and expressed no dissatisfaction with that decision.

In asserting that the present Illinois classification of illegitimates is violative of Federal constitutional principles, petitioners and *amicus* recommend that this court apply the stricter equal protection test which would require the State to justify the classification by a compelling governmental interest. It is claimed that the present classification is racially and sexually discriminatory and that illegitimacy is itself a suspect classification, thereby necessitating application of the stricter constitutional standard.

In support of the position that the statutory framework is racially discriminatory, petitioner in cause No. 47092 sets forth various statistical sources which she says indicate that an excessively disproportionate share of illegitimate children were born to blacks and other minorities as compared to Caucasians. In light of these statistics this petitioner concludes that section 12 of the Probate Act has evolved to the extent that it "fits into a pattern of legislation which often is only a thinly disguised cover for racial discrimination." A comparable claim of racial discrimination, predicated on similar statistics, was presented by the *amicus* in Labine v. Vincent with no apparent success. Moreover, section 12 of the Probate Act does not contain any racial classification and affects all members of the class of illegitimates without regard to racial heritage. Such a statute, without more, would not appear in and of itself to substantiate a claim that it is racially discriminatory merely because the bare statistical possibility exists that at any given time it could incidentally tend to affect to a greater extent a particular racial group within the general class. The alleged deprivation of which petitioner complains is remedied through the simple expedient of testamentary disposition by means of a will. And no claim is advanced that any racial group is restricted in any judicially cognizable manner from utilizing this procedure.

The argument that section 12 sexually discriminates so as to give rise to a stricter approach to Federal equal protection principles is also unpersuasive. We are cognizant of the recent decision wherein the Supreme Court struck down a Social Security provision which had precluded survivor's benefits to an unemployed widower who remained at home to care for his minor child, while permitting such payments to a similarly situated widow. The court there held that this classification was not rational under the statute's intended purpose. (Weinberger v. Wiesenfeld (1975), — U.S. —, 95 S.Ct. 1225, 43 L.Ed.2d 514.) However, while the claim is made that a classification by sex requires a more stringent application of equal protection principles, we find that only four members of the Supreme Court have accepted this position. (Frontiero v. Richardson (1973), 411

U.S. 627, 93 S.Ct. 1763, 36 L.Ed.2d 583 (plurality opinion); see also Stanton v. Stanton (1975), — U.S. —, 95 S.Ct. 1373, 43 L.Ed.2d 688; Schlesinger v. Ballard (1975), 419 U.S. 498, 95 S.Ct. 572, 42 L.Ed.2d 610 (Brennan, J., dissenting); Kahn v. Shevin (1974), 416 U.S. 351, 94 S.Ct. 1734, 40 L.Ed.2d 189 (Brennan, J., dissenting). We are unwilling to decide that all classifications based upon sex require that the state establish a compelling governmental interest under the Federal equal protec-

[4] No decision has been cited in which a classification based on illegitimacy has been expressly held to be a suspect classification. Rather the decisions concerning illegitimacy previously set forth would seem to have been determined on whether or not the classification could be said to be predicated on a rational basis. In Jimenez v. Weinberger (1974), 417 U.S. 628, 94 S.Ct. 2496, 41 L.Ed.2d 363, the Supreme Court stated it need not reach the argument as to whether a stricter equal protection standard was applicable in order to determine the validity of a classification premised on illegitimacy. Moreover, the *amicus* brief filed in Labine v. Vincent suggests the argument was advanced that stricter equal protection principles be utilized when reviewing a classification based on illegitimacy. This for several of the comparable reasons expressed in our discussion of the issues regarding alleged race and sex discrimination stemming from application of section 12 of the Probate Act, we are unable to presently conclude that a classification based on illegitimacy is a suspect classification under Federal constitutional interpretation.

The precise issue set forth in Labine v. Vincent is present in these appeals, *i. e.*, can an acknowledged illegitimate be treated differently than a legitimate child and thereby, in effect, be precluded from sharing in its father's estate by State laws governing intestate succession. In each of these specific appeals to "nourmountable barrier" to Mary Soderstarl and Margaret Marie Collins sharing in their fathers' estate has been created. In both instances the deceased fathers apparently lived for a substantial number of years. Since Louis Karas was survived by his spouse, he could have devised as much as two thirds of his estate to Mary Soderstarl. (Ill.Rev.Stat. 1973, ch. 3, par. 16; see Montgomery v. Michaels (1973), 54 Ill.2d 532, 534-5, 301 N.E.2d 468.) Because Robert Woods had no surviving spouse, he could have left his entire estate to Margaret Marie Collins if he had utilized the simple formalities of a will.

We further recognize that the State maintains an interest in prohibiting spurious claims against an estate. The parties to these appeals tend to agree that proof of a lineal relationship is more readily ascertainable when dealing with maternal ancestors. It is suggested that proof of paternal relationship may not be so readily ascertainable but that such considerations should be decided individually on the facts of each case. While establishing paternity in a proceeding to determine heirship is possible, situations may arise which are fraught with fraudulent circumstances. There exists the possibility that an illegitimate "grandson" may seek to inherit from his "grandfather" who dies not only intestate but also after the death of his own son and without knowledge of the existence of the illegitimate. Similar circumstances might also arise in which illegitimates, claiming a collateral relationship, would seek rights to the estates of paternal intestate kindred. (See generally Gregory v. County of La-Salle (1968), 91 Ill.App.2d 290, 234 N.E.2d 66.) There also may be situations in which a "father's" testamentary disposition is challenged on behalf of an illegitimate child who was born after the will was executed, thereby possibly permitting the child to recover a share of the estate equivalent to that allowed if the "father" had died intestate. Ill.Rev.Stat.1973, ch. 3, par. 48; 2

Horner, Probate Practice and Estates sec. 1331 (4th ed. 1960).

[5] In summary, to accept the numerous arguments raised by petitioners and *amicus* in regard to Federal equal protection principles would result in this court's placing strictures on Labine v. Vincent, *supra*. Of course, a State may not impose such greater restrictions as a matter of *federal constitutional law* when this Court [United States Supreme Court] specifically refrains from imposing them." (Emphasis in original.) Oregon v. Haas (1975), — U.S. —, —, 95 S.Ct. 1215, 1219, 43 L.Ed.2d 570, 576.

There remains the contention that section 12 of the Probate Act is unconstitutional because it violates State constitutional guarantees that "equal protection of the laws shall not be denied or abridged on account of sex * * *." (Ill.Const. (1970), art. I, sec. 18, S.H.A.) In People v. Ellis (1974), 57 Ill.2d 127, 132-33, 311 N.E.2d 98, we construed this provision as rendering any classification based on sex to be a "suspect classification," thus subjecting it to "strict judicial scrutiny" and requiring the existence of a compelling State interest to justify the classification. See also Phelps v. Bing (1974), 58 Ill.2d 32, 316 N.E.2d 775.

Petitioner in cause No. 47092 first claims that section 12(4) of the Probate Act discriminates against the father and his descendants when his illegitimate child dies intestate leaving no spouse or descendants. If this situation occurs, petitioner says the father and his descendants are precluded from sharing in the child's estate while the mother and her descendants may share in the estate. A comparable attack is made upon sections 12(5) to 12(7), which generally concern inheritance from the estate of an illegitimate by maternal kindred while omitting consideration of paternal kindred. Petitioner also maintains that section 12 requires a mother to draw a will in order to disinherit her children while a father of an illegitimate child, who is not legitimized by the procedures of section 12, need not do so. Conversely, if the father of the illegitimate wishes the illegitimate child to share in his estate he must execute a will, whereas the mother need not resort to this course of action. Finally, petitioner argues that she is injured by limiting her inheritance to the estate of her mother who dies intestate or her maternal ancestors and by precluding her inheritance from her father or his ancestors. She claims that she should either inherit from both or inherit from neither, and she concludes that as a result of section 12 of the Probate Act she is injured by the sexual discrimination against each of her parents.

No contention is asserted that section 12 of the Probate Act results in any sexual discrimination as between similarly situated males and females who seek inheritance from the estates of their fathers or other paternal kindred. Under section 12 no discrimination inures to an illegitimate as a result of the illegitimate's sex. The question therefore presented in whether under these circumstances one may assert a claim of discrimination based upon the sex of another person pursuant to section 18 of article I of the State Constitution.

[6] In our decisions of *Ellis* and *Bing* the individuals were treated differently on the basis of their sex because of classifications in the Juvenile Court Act and Marriage Act. Neither case involved a situation wherein the affected individuals asserted a constitutional deprivation based solely on the sex of another person, as in these appeals. The official explanation of section 18 of article I recites that "no government in Illinois may deny equal protection of the law to anyone because of his or her sex." (7 Record of Proceedings, Sixth Illinois Constitutional Convention 2688.) This explication indicates that State constitutional issues raising questions of classifications based on sexual differentiation may be raised by in-

dividuals who are thereby affected as a result of their own sex. For this reason, we are of the opinion that petitioner's State constitutional claim is without merit.

[7] *Amicus* argues that both parents have a duty to support a child and if one parent dies the survivor's duty is necessarily increased. *Amicus* says that section 12 invidiously discriminates against the surviving mother in preference to the surviving father of the illegitimate child. It is argued that the father is aided in his obligation of support because the child may inherit from the mother. Conversely, *amicus* argues, the mother is not aided and, in fact, is burdened, for the child cannot inherit from the father and support from the father is no longer available. *Amicus* concludes that section 12 "discriminates against women by failing to provide for their children a legal right of inheritance equivalent to that granted to the children of surviving male parents." To buttress this argument *amicus* refers only to sections 9 and 11 of the Probate Act (ch. 3, pars. 9 and 11), which *amicus* asserts are designed to prevent a decedent's closest relatives from becoming wards of the State.

We have examined these provisions and are unable to interpret these sections as intending to create a statutory scheme for financial support. Section 9, in pertinent part, merely says that the Probate Act shall be liberally construed. Section 11 establishes an intestate succession for the devolution of property not involving illegitimates. There is no basis evident from the language employed in either section which permits an interpretation that these provisions were intended to alleviate the possibility that certain close relatives of the decedent would seek public assistance. Obviously the application of section 11 provides the basis wherein certain relatives may assure their living standard or even elevate it by their inheritance. But this provision also allows inheritance to wealthy relations to the exclusion of impoverished individuals who may be only slightly more remote in their relationship to the decedent. Moreover, relations of equal degree similarly inherit even though there may exist extreme divergence in their financial status.

[8] Having concluded that the petitioners were not denied equal protection of the law, we do not find that they were deprived of due process of law by the trial courts' refusals to permit a hearing wherein they might seek to establish the paternity of the decedents. *Cf.* Stanley v. Illinois (1972), 405 U.S. 645, 92 S.Ct. 1208, 31 L.Ed.2d 551.

[9] There remains the contention advanced by petitioner in cause No. 47092 that she has a preference in issuance of letters of administration as set forth in section 96(2) of the Probate Act (ch. 3, par. 96(2)). In determining that petitioner may not inherit from her father under the circumstances presented in this case, we do not believe it logical that she should be allowed to participate in the administration of his estate. See Myatt v. Myatt (1867), 44 Ill. 473, 476.

Accordingly, the judgment of the appellate court in cause No. 46986 is affirmed. The judgment of the circuit court of Cook County in cause No. 47092 is affirmed.

Judgments affirmed.

IN THE

Supreme Court of the United States

OCTOBER TERM 1975

No. 75-5952

DETA MONA TRIMBLE AND
JESSIE TRIMBLE,

Appellants,

v.

JOSEPH ROOSEVELT GORDON, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF OF THE APPELLANTS

DEVEREUX BOWLY
CHARLES LINN
Legal Assistance Foundation
of Chicago
911 South Kedzie Avenue
Chicago, Illinois 60612
(312) 638-2343

JAMES D. WEILL
JANE G. STEVENS
Legal Assistance Foundation
of Chicago
343 South Dearborn Street
Chicago, Illinois 60604
(312) 341-1070

Attorneys for Appellants

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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OPINION BELOW

The Illinois Supreme Court issued no written opinion in this cause. A copy of its official order is contained in the Appendix at pages 54-56. The Appendix at page 53 also contains a certified transcript of the Illinois Supreme Court ruling from the bench that its decision in this cause was based upon its decision in *In re Estate of Louis Karas*, 61 Ill.2d 40 (June 2, 1975). The *Karas* decision is contained in the Appendix at pages 38-52.

JURISDICTION

The judgment of the Illinois Supreme Court, affirming the trial court's holding that Deta Mona Trimble is not the heir at law of Sherman Gordon, was entered on September 24, 1975. Notice of Appeal was filed on November 17, 1975. The Jurisdictional Statement was filed in this Court on December 22, 1975. On March 22, 1976, probable jurisdiction was noted.

The jurisdiction of the Court to hear this appeal is conferred by Title 28, United States Code, Section 1257(2).

STATUTE AND CONSTITUTIONAL PROVISION INVOLVED

CONSTITUTIONAL PROVISION:

United States Constitution, Amendment XIV.

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

CHALLENGED STATUTE:

Illinois Revised Statutes, Ch. 3, Sec. 12 Illegitimates (final paragraph).

> An illegitimate child is heir of his mother and of any material ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents inter-marry and who is acknowledged by the father as the father's child is legitimate.

QUESTIONS PRESENTED

1. Does the Illinois Probate Act, which denies an illegitimate child any intestate succession rights from his father, while granting such rights to a legitimate child whose father dies intestate, violate the Equal Protection Clause of the Fourteenth Amendment by discriminating against illegitimate children?

2. Does section 12 of the Illinois Probate Act, providing that an illegitimate child whose father dies intestate is not his heir, but that an illegitimate child whose mother dies intestate is her heir, violate the Equal Protection Clause of the Fourteenth Amendment by discriminating invidiously among illegitimate children based on the sex of the decedent?

3. Does the sex-based classification in section 12 of the Illinois Probate Act, which provides that an illegitimate child is not the heir of his intestate father while providing that an illegitimate child whose mother dies intestate is her heir, violate the Equal Protection Clause of the Fourteenth Amendment by discriminating among the surviving parents of illegitimate children based on the sex of the surviving parent?

STATEMENT OF THE CASE

This case involves the question of whether the illegitimate child of a man who died intestate may be denied statutory inheritance rights available to all legitimate children. Sherman Gordon, a 28 year old resident of Chicago, died May 23, 1974, leaving no will. He was the victim of a homicide. The value of his estate is approximately $2,500. He died leaving no spouse, and appellant Deta Mona Trimble, 3 years old at the time of his death, his only descendent.

Appellant Jessie Trimble is a 30 year old woman residing in Chicago. She and Sherman Gordon lived together with their child, Deta Mona Trimble, from 1970 until his death. However, they never married. On January 2, 1973, the Circuit Court of Cook County, Illinois entered an order in the case of *Jessie Trimble v. Sherman Gordon,* 72 MC1-846169, finding said Sherman Gordon to be the father of Deta Mona Trimble, and ordering him to pay $15 per week for her support to her mother Jessie Trimble. (A. 7-10) Sherman Gordon in his day-to-day activities publicly acknowledged Deta Mona Trimble as his child, and he supported her pursuant to the said paternity order. (A. 24-26)

On July 25, 1974, Deta Mona Trimble, by her mother and next friend, Jessie Trimble, filed a Petition for Letters of Administration, Determination of Heirship and Declaratory Relief in the Circuit Court of Cook County, Illinois. (A. 3-10) On August 12, 1974, Jessie Trimble filed a Petition For Letters of Administration to Collect, and an order was entered on that date appointing her Administrator to Collect. (A. 11-12)

On August 14, 1974, the heirship hearing was held, and in addition to evidence as to the other heirs of the decedent Sherman Gordon, and the introduction into evidence of the prior paternity adjudication, the Court heard arguments as to the unconstitutionality of Illinois Revised Statutes, Ch. 3, Sec. 12, as it applies to illegitimate children. (A. 16-30) On August 15, 1974, the court denied Jessie Trimble's Petition For Letters of Administration. (A. 13)

On September 9, 1974, the court entered the Order Declaring Heirship, which provided that the only heirs of Sherman Gordon are his father, mother, brother, two sisters, and half-brother. (A. 14-15) In so doing it was held that Deta Mona Trimble was not the heir at law of Sherman Gordon. An Appeal to the Illinois Appellate Court was taken from the September 9, 1974, order. (A. 31-32) A motion for direct appeal to the Illinois Supreme Court was made. (A. 33-35) That court entered an order allowing direct appeal, thus bypassing the Illinois Appellate Court. (A. 36-7) The Illinois Supreme Court also granted leave to appellants to file an Amicus Brief in the case of *In Re Estate of Louis Karas,* which was then pending before the court. In that case, and its companion case, *In Re Estate of Robert Woods,* illegitimate children whose fathers had died intestate challenged on constitutional grounds the same statute that is challenged herein.

On June 2, 1975, the Illinois Supreme Court issued its opinion in *In Re Estate of Louis Karas,* 61 Ill.2d 40 (1975), upholding the statute and rejecting claims as to its unconstitutionality, including arguments made in the Amicus Brief. (A. 38-52) On September 24, 1975, oral argument was held in the instant case before the Illinois Supreme Court, and Chief Justice Underwood orally

delivered the opinion of the court from the bench saying the trial court judgment was affirmed, based upon the *Karas* holding. (A. 53) On October 15, 1975, the court issued its written order, effective September 24, 1975, affirming the trial court. (A. 54-56) It is from the order dated September 24, 1975, issued October 15, 1975, that this appeal is taken. On October 21, 1975, Justice Daniel P. Ward of the Illinois Supreme Court entered an order recalling and staying the mandate, pending resolution of this Appeal. (A. 57)

The Notice of Appeal to this Court was filed in the Illinois Supreme Court on November 17, 1975. (A. 58-59) The Appeal and Motion to Proceed In Forma Pauperis were docketed on December 22, 1975. On March 22, 1976, this Court granted the Motion for Leave to Proceed In Forma Pauperis, (A. 60) and noted probable jurisdiction. (A. 61)

SUMMARY OF ARGUMENT

Appellants contend that Sec. 12 of the Illinois Probate Act violates their right to Equal Protection of the Law as guaranteed by the Fourteenth Amendment to the United States Constitution. The statute declares illegitimate children to be the heirs of their mothers but not of their fathers. It renders the child's intestate succession rights dependent on the marital status of his parents at his birth. It also renders the child's succession rights dependent on the sex of the deceased parent. This legislative classification offends the Equal Protection Clause, as the deprivations visited on both the illegitimate child and his surviving mother fail to advance any valid state interest.

The Illinois Supreme Court relied exclusively on *Labine v. Vincent*, 401 U.S. 532 (1971), in upholding the constitutional validity of the statute. In doing so, it ignored the fact that both the analytic methodology and the rationales of *Labine* have been rejected by later rulings of this Court in cases concerning illegitimacy and invidious discrimination in the probate field.

The Illinois Supreme Court also ignored crucial distinctions between the Louisiana statutory scheme at issue in *Labine* and the Illinois statute at issue here. Louisiana, unlike Illinois, did not also discriminate among illegitimate children, did not completely exclude any children from receiving any benefits from the estate, and did not discriminate against women by disinheriting the children from only the father's estate.

The Illinois Supreme Court thus erred in ruling that illegitimate children can constitutionally be prohibited from inheriting from their fathers in intestacy. This Court should find that the application of *Labine* to this case is an unwarranted expansion of *Labine*, that the judgment below was in error, and that *Labine* is essentially limited to its facts, valid with respect only to the unusual Louisiana scheme at issue there. Alternatively, the *Labine* decision can be reconsidered in light of intervening decisions, and overruled.

The strict judicial scrutiny this Court has reserved for certain statutory classifications is warranted in examining this and other discriminations against illegitimate children. Recent decisions of this Court in cases concerning discrimination against illegitimate children have ascribed to such children all of the characteristics of other "suspect classes." Illegitimacy is an accident of birth; the members of the adversely affected class cannot change their status; the class constitutes a

discrete and insular minority; and the class has been historically and is currently stigmatized by society. Thus, the strict judicial scrutiny applicable to classifications based on race, alienage, and nationality should be used to examine the Probate Act's discrimination against illegitimate children. Since the discrimination serves no compelling state interest, it is invalid.

Even if this Court considers it unnecessary to reach the question of suspect class status, the statute is invidiously discriminatory. In its recent decisions concerning discrimination against illegitimate children, this Court has subjected such discrimination to rigorous review. The fact that this case concerns a probate code provision does not insulate the state action here from review under the Fourteenth Amendment, as is established by recent decisions. The standard of review, moreover, must be in accord with the standard of review applied to other classifications against illegitimate children, which requires a fair, substantial and significant relation to a permissible state purpose.

Examined under any standard of review, Section 12 of the Illinois Probate Act is constitutionally defective since the discrimination directed against illegitimate children is not rationally related to any legitimate state interest. The asserted purpose of strengthening family life, accomplished by imposing a disability on children powerless to prevent the condemned behavior, cannot logically be ascribed to the Illinois Probate Code; even if it could, this Court has repeatedly condemned as irrational statutes which purport to deter adults from engaging in non-marital relations by penalizing the innocent offspring of such relations. The state's interest in the prompt and definitive devolution of property left by decedents also is not furthered by the classification

since Sherman Gordon was judicially determined to be the father of Appellant Deta Mona Trimble. Moreover, with respect to classifications based on legitimacy, this Court has not tolerated general and over-inclusive prophylactic rules which avoid the need for individualized determinations.

That the decedent could have left a will surmounting the statutory bar to succession by his offspring cannot constitutionally justify the statute, since the means of overcoming the disability imposed are beyond the child's control. Furthermore, another unarticulated but conceivable "rationale"–that the legislature by enacting Sec. 12 acted in accordance with the "presumed intent" of the decedent–is also unavailable both because there is no factual predicate for the presumption and because it is constitutionally impermissible for a state to make such invidiously discriminatory assumptions. Under the Fourteenth Amendment the State may not take invidiously discriminatory action even in situations where a private citizen could.

Section 12 of the Probate Act contains another defect fatal to its validity under the Equal Protection Clause. The statute groups illegitimate children into sub-classes. For example, illegitimate children can inherit by intestate succession from their mother, but not from their father. This classification among illegitimate children, based on the sex of the deceased parent, cannot be linked to any valid state objective, and is invalid under recent decisions striking down such discrimination among children.

Finally, Section 12 of the Probate Act invidiously discriminates against women. The effect of Section 12 of the Probate Act is to assist the surviving father in meeting his financial and other obligations to the child,

while denying similar assistance to the surviving mother. This result is accomplished by making the deceased mother's estate available as a means of support to the child, supplementing the resources of the surviving father. The surviving mother, however, cannot receive comparable help from the deceased father's estate. This discrimination is particularly perverse in light of the clear economic disadvantage of surviving mothers as compared to surviving fathers. The economic disadvantage differentially burdens the entire nature and quality of the surviving mother's relationship to her child. Sex-based discriminations have been repeatedly condemned by this Court; a similar result is compelled here as the discrimination advances no legitimate interest of the state, while frustrating the state's valid concern for the welfare of minors.

Section 12 of the Probate Act, therefore, discriminates against and among illegitimate children, and against surviving mothers. These discriminations are invidious and further no legitimate state interest. The arbitrary and irrational classification of children by the legitimacy of their birth cannot be harmonized with the constitutional demand of equal protection, that those similarly situated be treated even-handedly by the state. This Court can accord full measure to this command by vacating the heirship order entered below, and declaring Section 12 of the Probate Act to be unconstitutional.

ARGUMENT

The question in this case is whether a state probate code provision which is a criss-cross of discriminations against illegitimate children, among illegitimate children,

and against women can withstand the Constitutional scrutiny which this Court has increasingly focused on provisions which disadvantage illegitimate children or women.

I.

THE ILLINOIS PROBATE ACT INVIDIOUSLY DISCRIMINATES AGAINST ILLEGITIMATE CHILDREN.

Deta Mona Trimble, five years old, has been denied the right to inherit the estate of her father (who lived with her and supported her until his death) solely because she is an illegitimate child. This unjust and illogical result has been mandated by Sec. 12 of the Illinois Probate Act, which makes illegitimate children the heirs of their mothers, but which excludes illegitimate children from intestate succession from and through their fathers. Ill. Rev. Stat., ch. 3, Sec. 12; *In re Estate of Karas*, 61 Ill.2d 40 (1975). Deta's father, Sherman Gordon, never married; thus, were Deta a legitimate child, she would inherit her father's entire estate under Illinois state law.[1]

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[1] Ill.Rev.Stat., ch. 3, §11(2): (Rules of Descent and Distribution)

> The intestate real and personal estate of a resident decedent and the intestate real estate in this state of a non-resident decedent after all just claims against his estate are fully paid, descends and shall be distributed as follows:
>
> * * *
>
> Second, when there is no surviving spouse but a descendant of decedent: the entire estate to the decedent's descendants per stirpes.

The Illinois Probate Act thus discriminates both against and among illegitimate children. It classifies children on the basis of the status of their birth, denying inheritance rights only to those who are illegitimate. This Court in recent years has repeatedly condemned statutory schemes which "invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez v. Perez*, 409 U.S. 535, 538 (1973). Moreover, the Act divides illegitimate children into two classes, those who survive their mothers and those who survive their fathers, granting intestate succession rights to the former while denying such rights to the latter. These classifications are invidious, arbitrary and capricious. They further no legitimate or rational state purpose and violate the Equal Protection Clause of the Fourteenth Amendment under any standard of review this Court may apply.

A. DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN IS SUSPECT AND THE STATUTE AT ISSUE SHOULD BE SUBJECTED TO STRICT JUDICIAL SCRUTINY.

In deciding this case the Illinois Supreme Court relied on the immediately preceding case of *In re Estate of Karas*, 61 Ill.2d 40 (1975). In *Karas* the Court did not actually discuss the underlying question of whether discrimination against illegitimate children should be suspect. It only noted, correctly, that this Court has not explicitly ruled such discrimination suspect, and it summarily dismissed the argument. 61 Ill. 2d at 51-52. Although this Court has not yet declared discrimination against illegitimate children to be subject to strict

scrutiny, the recent illegitimacy decisions do support the conclusion that strict scrutiny is appropriate.[2] Moreover, the statutory scheme presented here is typical of that of 21 states. (The twenty states besides Illinois are listed in the Appendix to this Brief.)[3] An

[2] This Court's opinions in cases involving classifications based on legitimacy, and in particular the apparent anamoly of the early illegitimacy decision in *Labine v. Vincent*, 401 U.S. 532 (1971), have caused some confusion in the lower courts, some criticism of *Labine*, and a general pattern in which decisions relying on *Labine's* rationales have been reversed on appeal, while decisions distinguishing *Labine* and relying on subsequent cases have been affirmed. *Compare Norton v. Weinberger*, 364 F. Supp. 1117 (D. Md. 1973), *vacated and remanded* 418 U.S. 902 (1974), *original opinion adhered to*, 390 F. Supp. 1084, *jurisdiction postponed to hearing on merits*, 422 U.S. 1054 (1975); *Lucas v. Secretary of H.E.W.*, 390 F. Supp. 1310 (D.R.I., 1975), *probable jurisdiction noted*, ____ U.S. ____, 96 S. Ct. 32, 46 L.Ed.2d 36 (1975); *Tanner v. Weinberger*, 525 F.2d 51 (6th Cir., 1975); *Eskra v. Morton*, 524 F.2d 9 (7th Cir., 1975), *reversing* 380 F. Supp. 205 (W.D. Wisc., 1974); *Beaty v. Weinberger*, 428 F.2d 300 (5th Cir., 1973), *aff'd.* 418 U.S. 901 (1974); *Parker v. Sec'y of H.E.W.*, 453 F.2d 850 (5th Cir., 1972); *Severance v. Weinberger*, 362 F. Supp. 1348 (D.D.C., 1973); *Jimenez v. Weinberger*, 353 F. Supp. 1136 (N.D. Ill., 1973), *rev'd.* 417 U.S. 628 (1974); *New Jersey Welfare Rights Organization v. Cahill*, 349 F Supp. 491 (D.N.J., 1972), *rev'd* 411 U.S. 619 (1973); *Williams v. Richardson*, 347 F. Supp. 544 (W.D.N. Car., 1972); *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md., 1972), *aff'd.* 409 U.S. 1069 (1972); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn., 1972), *aff'd* 409 U.S. 1069 (1972); *Weber v. Aetna Casualty & Surety Company*, 257 La. 424, 242 So.2d 567 (1971), *rev'd.* 406 U.S. 164 (1972); *Green v. Woodard*, 40 Ohio App.2d 101, 318 N.E.2d 397 (Court of Appeals of Ohio, Cuyahoga County, 1974).

[3] With the exception of Louisiana, the other 29 jurisdictions allow illegitimate children to inherit from either parent, *see* the Appendix to this brief. Louisiana is unique in barring illegitimate children from inheriting in intestacy from either parent.

unambiguous holding by this Court that such statutes are subject to strict scrutiny would effectively settle the issue of their validity. Therefore, although the provisions at issue here are unconstitutional under any applicable standard of review, appellants urge this Court to adopt the "strict scrutiny" test.

Illegitimacy shares all of the relevant characteristics that have been the bases for the Court's designations of other classifications as "suspect." Recently, four members of this Court (expressing the view that classifications based on sex are suspect) in *Frontiero v. Richardson*, 411 U.S. 677 (1973), described certain criteria particular to suspect classes, characteristics shared by classifications based on illegitimacy. Illegitimacy,

> . . . like race and national origin, is an immutable characteristic determined solely by the accident of birth, [therefore] the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate 'the basic concept of our system that legal burdens should bear some relationship to individual responsibility . . .' *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 175 (1972). And what differentiates sex from such nonsuspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

The reliance on *Weber*, an illegitimacy case, is logical and appropriate. Illegitimacy, like race and national origin, is an unalterable condition, a condition over which the children so labeled have no control, a condition they are powerless to change, a condition

bearing no relation to ability to perform or to contribute to society, a condition bearing no relationship to individual responsibility.[4]

This Court has recognized, in many cases dealing with classifications based on race, alienage, and national origin, that invidious discrimination against groups on the basis of the conditions of their birth or ancestry is constitutionally suspect. *See, e.g., Loving v. Virginia*, 388 U.S. 1 (1967); *In re Griffiths*, 413 U.S. 717 (1973); *Sugarman v. Dougall*, 413 U.S. 634 (1973); *Oyama v. California*, 332 U.S. 633 (1945). "Distinctions between citizens solely because of their ancestry are by their very nature odious to a free people whose institutions are founded upon the doctrine of equality." *Hirabayashi v. U.S.*, 320 U.S. 81, 100 (1942). This statement was recently adopted by the Seventh Circuit Court of Appeals in striking down a discrimination against illegitimate children based on

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[4] One hundred years ago this Court recognized injustice in a similar context, explaining the Constitutional prohibition against Forfeitures of the Blood:

> In England, attainders of treason worked corruption of blood and perpetual forefeiture of the estate of the person attainted, to the disinherison of his heirs, or of those who would otherwise be his heirs. Thus innocent children were made to suffer because of the offense of their ancestor. When the Federal Constitution was framed, this was felt to be a great hardship, and even rank injustice. *Wallach v. Van Riswick*, 92 U.S. 202, 210 (1875)

Discrimination against illegitimate children has been compared to attaching "an archaic corruption of the blood, a form of bill of attainder, "*King v. Smith*, 392 U.S. 309, 336 n.5 (1968), Douglas, J., concurring, and with a "badge of ignobility" violative of Art 1, §9, Clause 8 of the Constitution, *Eskra v. Morton*, 524 F.2d 9, 13 n.8 (7th Cir., 1975).

Wisconsin probate law. *Eskra v. Morton,* 524 F.2d 9, 13 (1975).

The disability based on birth is graphically illustrated by Deta Mona Trimble's case. A five-year old girl, born an illegitimate child, she is relegated by the Illinois Probate statute to second-class citizenship. There is no way that she could ever take any act to alter her status. As to her, illegitimacy is an uncontrollable accident of birth.

The stigma associated with certain classifications has been the other major factor in the Court's treatment of them as suspect. Illegitimacy shares with other such statuses the fact that designation by these classifications subjects a child to "a stigma of inferiority and a badge of opprobrium."[5] This Court has clearly recognized that illegitimate children share this experience with other suspect classes, in *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164 (1972):

> The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liaisons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility or wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual—as well as an unjust—way of deterring the parent. Courts are powerless to prevent the *social opprobrium suffered by these hapless children,* but the Equal Protection Clause does enable us to strike down discriminatory laws

[5] Note, *Developments in the Law of Equal Protection,* 82 Harv. L. Rev. 1065, 1127 (1969).

> relating to *status of birth*[14] where—as in this case—the classification is justified by no legitimate state interest, compelling or otherwise. 406 U.S. 164, 175-176.[6]

These views were specifically reiterated in *Jimenez v. Weinberger,* 417 U.S. 628, 632 (1974).

The sociological and psychological literature completely supports the Court's understanding of the opprobrium suffered by illegitimate children. *See,* for example, Krause, *Illegitimacy, Law and Social Policy* (1971); Krause, "Equal Protection for the Illegitimate," 65 Mich. L. Rev. 477 (1967); and "Illegitimacy," Vol. 7, *Encyclopedia of the Social Sciences,* 579 (1935). The likelihood that any classification on the basis of illegitimacy will subject a child so classified to such opprobrium, ridicule and condemnation, is great enough to establish differential treatment of illegitimacy as suspect.

Moreover, illegitimate children are a "discrete and insular minority" which is disadvantaged in the majoritarian political process and which merits special protection by the courts. *See* Mr. Justice Stone's footnote in *United States v. Carolene Prod. Co.,* 304 U.S. 144, 153 n.4 (1938); *In re Griffiths,* 413 U.S. 717, 721 (1973); *Sugarman v. Dougall,* 413 U.S. 634, 642 (1973). In 1970, 10.1% of the children born in the United States were illegitimate. That same year 13.43%

[6] Emphasis added, Footnote 13 is omitted. Footnote 14 states: "See *Graham v. Richardson,* 403 U.S. 365 (1971); *Hunter v. Erickson,* 393 U.S. 385 (1969); *Brown v. Board of Education,* 347 U.S. 483 (1954); and see also *Hirabayashi v. United States,* 320 U.S. 81 (1943)." All of the cases referred to concern suspect classifications.

of the children born in Illinois were illegitimate.[7] But, in large part due to the stigma which would lead illegitimately-born persons to avoid identifying themselves, illegitimate children do not wield the influence that even these limited numbers warrant (a criterion suggested by Justice Stone), and so are subject too easily to statutory discrimination.

Thus, illegitimate children, as a group, bear "the traditional indicia of suspectness" described by the Court in *San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 28 (1973). They are

> . . .saddled with such disabilities, or subjected to such a history of purposeful unequal treatment, or relegated to such a position of political powerlessness as to command extraordinary protection. . .

This Court recognized, in *Weber v. Aetna Casualty and Surety Co.*, 406 U.S. 164 (1972), that illegitimacy meets suspect class criteria, as is illustrated by the passage from *Weber* quoted above, at pp. 16-17. Indeed, two members of this Court have suggested that the classification of illegitimacy has already been recognized, at least in certain contexts, to be suspect. Justice Stewart, concurring in *Rodriguez, supra*, at 60,

[7] U.S. Bureau of Census, *Statistical Abstract of the United States: 1974* (95th edition), Washington, D.C., p. 56. The rate of illegitimacy among blacks is somewhat higher: in the United States in 1970 it was 34.93% *Id.* One commentator has noted the mutually reinforcing effect of a double stigmatization: "The exceptions to this liberal trend [in treatment of illegitimate children] in the United States in the early 1960's included considerable criticism of low-income Negro families who had repeated illegitimate births." Vincent, "Teenage Unwed Mothers in American Society," XXII, No. 2 The Journal of Social Issues 22, 31 (April, 1966).

and Justice Marshall, dissenting in *Rodriguez*, at 108. In *Frontiero v. Richardson*, 411 U.S. 677, 681 (1973), as mentioned, four Justices cited *Weber, supra*, to identify criteria of suspectness. And dissenting in *Sugarman v. Dougall*, 413 U.S. 634, 657 (1973), Justice Rehnquist aligned illegitimacy with the traditional suspect classes (distinguishing alienage): "a status or condition such as illegitimacy, national origin or race, which cannot be altered by an individual."[8]

In sum, this Court's past expressions and applications of this test represent varying articulations and shadings of a common theme: the historical and ongoing imposition of political, social and legal disabilities and isolation upon a group makes appropriate a close scrutiny of a discrimination against the group. Where the legal classification at issue perpetuates or intensifies the disabilities, and/or further stigmatizes and isolates the group, then that classification can only be justified by a compelling governmental interest. As this Court said in *Brown v. Board of Education*, 347 U.S. 483, 494 (1954):

> To separate [these children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and

[8] Two federal district courts have concluded discrimination against illegitimate children should be a suspect classification. *Lucas v. Secretary of HEW*, 390 F. Supp. 1310, 1316-1319 (D.R.I. 1975), *probable jurisdiction noted*, 96 S. Ct. 32, (1975); *Doe v. Norton*, 365 F. Supp. 65, 79 n.23 (D. Conn. 1973), *vacated and remanded on other gds. sub nom. Roe v. Norton*, 422 U.S. 391 (1975). See also *Eskra v. Morton*, 380 F. Supp. 205, 215 (W.D. Wisc. 1974), *rev'd on other grounds*, 524 F.2d 9 (7th Cir. 1975); *Severance v. Weinberger*, 362 F. Supp. 1348, 1353 n.15 (D.D.C. 1973).

> minds in a way unlikely ever to be undone. . . The impact is greater when it has the sanction of the law; for the policy of separating the races is usually interpreted as denoting the inferiority of the negro group.

The historical discrimination perpetuated by this law can only be interpreted as imputing lesser worth to the illegitimate children. And the denotation of inferiority by law and society can only create within the faultless children themselves a diminution of feelings of self-worth. The historic and ongoing social opprobrium attached to the status of illegitimacy has been shown to have an effect on children analogous to that noted by the Court in *Brown*. As one commentator has stated:

> To give the illegitimate child an inferior status because, through no fault of his own, his parents were never joined in an easily dissolved union is a hypocrisy which can only frustrate and alienate him from the society which created his inferiority.[9]

Similarly, a 1958 study found that illegitimate children, when compared to legitimate children of similar economic status, showed differences in "adjustment," as well as lower I.Q.'s, and lower scores on the California Test of Personality. The study also found greater differences between the two groups as the children grew older, hypothesizing that the illegitimate children became increasingly aware of their socially interior status.[10]

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[9] Marcus "Equal Protection: The Custody of the Illegitimate Child," 11 Journal of Family Law 1, 17-18 (1971).

[10] Jenkins, "An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children," 64 American Journal of Sociology 196 (1958).

In order to protect fully the rights of these children who have suffered "through the ages society's 'illogical and unjust' condemation," *Weber, supra,* 406 U.S. at 175, this and other discriminations against illegitimate children should be designated as suspect.[11]

Because the classification is suspect, this discriminatory statute, which denies to illegitimate children rights granted to all legitimate children, must be subjected to strict scrutiny and can be upheld only if it furthers a compelling state interest. *E.g., Oyama v. California,* 332 U.S. 633 (1948). Since, as will be shown in later sections, the statute is not even rationally related to any legitimate state purpose, it can not meet the strict scrutiny test.

B. THE INVIDIOUS DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN IS INCONSISTENT WITH THE STANDARDS ENUNCIATED BY THIS COURT IN CASES CONCERNING ILLEGITIMACY AND IN RELATED CASES

Since 1968, this Court has considered the constitutionality of discrimination against illegitimate children

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[11] This Court has also suggested that classifications against illegitimate children affect "sensitive and fundamental personal rights," another criterion for heightened scrutiny. *Weber v. Aetna Casualty & Surety Co.,* 406 U.S. 164, 172 (1972). Cf. *Levy v. Louisiana,* 391 U.S. 68, at 71 (1968).

ten times;[12] in every case but one, *Labine v. Vincent*, 401 U.S. 532 (1971), the Court has found the classification involved to be offensive to illegitimate children's rights to Equal Protection, under either the Fourteenth Amendment or the Fifth Amendment. A review of these decisions makes it clear that *Labine* is an anomaly, so undermined by subsequent decisions that not only its standard of review and its rationale, but also its holding are of dubious validity.

Levy v. Louisiana, 391 U.S. 68 (1968), and *Glona v. American Guarantee and Liability Insurance Co.*, 391 U.S. 72 (1968), examined a Louisiana wrongful death statute. They found that the discrimination against illegitimate children impinged upon "intimate, familial relationships" and that "illegitimacy of birth has no relation to the wrong being compensated." 391 U.S. at 71. Mr. Justice Douglas said for the Court that "it is invidious to discriminate against [illegitimate children] when no action, conduct, or demeanor of theirs is possibly relevant" to the harm complained of. 391 U.S. at 72.

In 1971 the Court decided *Labine*, which will be extensively discussed below. A year later, in *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164

[12] *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Beaty v. Weinberger*, 478 F.2d 300 (5th Cir. 1973), *aff'd* 418 U.S. 901 (1974); *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973); *Griffin v. Richardson*, 346 F. Supp. 1226 (D.Md. 1972), *aff'd.* 409 U.S. 1069 (1972); *Davis v. Richardson*, 342 F. Supp. 588 (D.Conn. 1972), *aff'd* 409 U.S. 1069 (1972); *Gomez v. Perez*, 409 U.S. 532 (1972); *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972); *Labine v. Vincent*, 401 U.S. 532 (1971); *Glona v. American Guarantee and Liability Insurance Company*, 391 U.S. 73 (1968); *Levy v. Louisiana*, 391 U.S. 68 (1968).

(1972), this Court considered the constitutionality of a provision in the Louisiana Workmen's Compensation Act which discriminated against unacknowledged illegitimate children. The illegitimate children claimed workmen's compensation benefits after the death of their father, and were denied benefits because their legitimate half-siblings had exhausted the maximum allowable amount of compensation. The Court both noted that "sensitive and fundamental personal rights" were involved, 406 U.S. at 172, and used language appropriate to a decision that classifications based on illegitimacy are inherently suspect or otherwise deserving of heightened scrutiny, 406 U.S. at 175-176.[13]

In 1972 and 1973 this Court considered four other cases concerning the constitutional rights of illegitimate children, and after carefully distinguishing *Labine* in the opinion in *Weber*, the Court did not find it necessary to refer to *Labine* again. *Weber* controlled in *Gomez v. Perez*, 409 U.S. 535 (1973), and in *New Jersey Welfare Rights Organization v. Cahill*, 411 U.S. 619 (1973), as it must have in the affirmances in *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd.* 409 U.S. 1069 (1972), and *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd.* 409 U.S. 1069 (1972), and as it must here.

In *Griffin v. Richardson, supra*, and *Davis v. Richardson, supra*, the Court affirmed decisions, holding *inter alia*, that "To distinguish [illegitimate children] from other children with the same needs and the same parent, solely on the basis of a condition of birth. . .is

[13] The full quotation appears at pp. 16-17, *supra*.

impermissible." *Davis v. Richardson,* 342 F. Supp. 588, 593 (1972), *aff'd.* 409 U.S. 1069 (1972).

Gomez v. Perez, 409 U.S. 535 (1973), invalidated a Texas statute which denied illegitimate children any right to support from their fathers. In a *Per Curiam* opinion, the Court recognized the legitimate state interest in avoiding difficult problems of proof, 409 U.S. at 538, but, citing both *Weber* and *Levy*, broadly declared that "a State may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." 409 U.S. 535, 538.

In *New Jersey Welfare Rights Organization v. Cahill,* 411 U.S. 619 (1973), (hereinafter "*N.J.W.R.O. v. Cahill*") the plaintiffs challenged a provision of the New Jersey "Assistance to Families of the Working Poor" program, on the grounds that its limitation only to families composed of "two adults of the opposite sex ceremonially married to each other" and their children effectively discriminated against illegitimate children. In its *Per Curiam* ruling, the Court cited *Weber, Levy, Gomez, Davis,* and *Griffin, supra.* Again, although the standard of review was not specified, the Court rejected a proferred state interest in preserving and strengthening family life.

In 1974, *Jimenez v. Weinberger,* 417 U.S. 628 (1974), struck down a provision of the Social Security Act which prohibited illegitimate children, born after the onset of their father's disability, from receiving Social Security benefits. *Jimenez* found it unnecessary to declare illegitimacy classifications suspect, but it did repeat the recitation of suspect-type criteria from *Weber* (see pp. 16-17, *supra*), 417 U.S. at 632, and incorporated *Weber's* general condemnation of such

classifications. While recognizing that the classification at issue was aimed at the legitimate goals of preventing spurious claims and ameliorating the problems attendant to determining paternity, the Court found the provisions unconstitutional, not because they were totally irrational or unrelated to that purpose, but because they were both "over-inclusive" and "under-inclusive." 417 U.S. at 636, 637. Such distinctions are not normally used in minimal equal protection scrutiny, where the classification need not be made "with mathematical nicety," *Lindsley v. National Carbonic Gas Co.,* 220 U.S. 61, 78 (1910). See Justice Rehnquist, dissenting, *Jimenez,* 417 U.S. at 638-641. The language and standards of *Jimenez* thus indicate that some form of heightened scrutiny was being applied.

Finally, in *Beaty v. Weinberger,* 418 U.S. 901 (1974), this Court affirmed the ruling of the Fifth Circuit, 478 F.2d 300 (5th Cir. 1973), invalidating a provision parallel to that in issue in *Jimenez.*

In sum, the decisions of this Court concerning illegitimacy show a distinct trend toward more than minimal scrutiny. The early decision in *Labine v. Vincent,* 401 U.S. 532 (1971), is an apparent exception, for it suggests in passing a standard of review even lower than the traditional minimal standard: "the power to make rules to establish, protect and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State." *Labine v. Vincent,* 401 U.S.

532, 538.[14] As noted by the four dissenting justices in *Labine*, the Court's refusal to ". . .consider in this case whether there is any reason at all, or any basis whatever, for the difference in treatment that Louisiana accords to publicly acknowledged illegitimate and to legitimate children," 401 U.S. at 548, intimates that

> . . .the Fourteenth Amendment's Equal Protection Clause is inapplicable to subjects regulable by the States—that extraordinary proposition would reverse a century of constitutional adjudication under the Equal Protection and Due Process Clauses. It is precisely state action which is subjected by the Fourteenth Amendment to its restraints. It is, to say the least, bewildering that a Court that for decades has wrestled with the nuances of the concept of "state action" in order to ascertain the reach of the Fourteenth Amendment, in this case holds that the state action here, because it is state action, is insulated from these restraints. *Id.* at 549.

This aspect of *Labine* has come under considerable analysis and criticism, and this Court has completely abandoned the *Labine* level of analysis in the later illegitimacy cases and in *Reed v. Reed*, 404 U.S. 71 (1971). *Reed* examined an Idaho state law, which, like the *Labine* statute, was established to regulate the intestate disposition of a decedent's property. *Reed* found the sex discrimination in such a law not to bear

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[14]At 401 U.S. 532, n.6, the Court also commented:

Even if we were to apply the "rational basis" test to the Louisiana intestate succession statute, that statute clearly has a rational basis in view of Louisiana's interest in promoting family life and directing the disposition of property left within the State. (Emphasis added)

a *"fair and substantial relation to the object of the legislation,* so that all persons similarly circumstanced shall be treated alike." 404 U.S. at 75-76. (Emphasis added.) Since, as will be shown, *Reed* is being cited by lower courts as evidence for a form of heightened scrutiny, any inference from *Labine* that state action in the probate area generally or in the probate of intestate property specifically is insulated from equal protection scrutiny is incorrect. *Reed* shows that state action in this field is subject to normal review, and the level of such review is, as always, dependent in large part on the identity and characteristics of the group against which the discrimination is directed. *Cf. Evans v. Newton*, 382 U.S. 296 (1966); *Pennsylvania v. Board of City Trusts*, 353 U.S. 230 (1957); *Eskra v. Morton*, 524 F.2d 9, 14 (7th Cir. 1975).

In this context, *Reed* and the later illegitimacy cases, from *Weber* through *Jimenez*, establish that some heightened scrutiny is appropriate here. A number of lower courts have concluded that this Court's opinions in certain cases, including particularly the illegitimacy cases like *Weber* and the sex cases like *Reed*, have created a "third tier" of judicial scrutiny, between strict scrutiny and minimal review, in effect a reinvigorated standard of review, at least in cases involving invidious discrimination against groups that bear many of the indicia of suspectness but have not been designated

suspect *per se*.[15] In particular, *Reed v. Reed*, in requiring that the proferred state interest bear "a fair and substantial relationship" to the legislative goal, requires close scrutiny of the nature of the discrimination and of both the governmental interest urged in support of the provision and the means used to further that interest.

Regardless of the label attached to such review by the lower courts, the crucial factor here is that *Reed*, read with the illegitimacy cases, simply requires that the instant classification be deemed invidiously discriminatory against a particular disadvantaged group; this action by the State must be scrutinized for a fair, substantial or significant relation to permissible statutory purposes. Even if this Court, then, does not apply strict scrutiny, the instant classification against illegitimate children is, at a minimum, approximately weighed and scrutinized under a vigorous, means-oriented inquiry, which will require, at least, that the classification bear a "fair and substantial relation," *Reed*, 404 U.S. at 76, or "significant relationship,"

[15]See, *e.g.*, *Berkelman v. San Francisco United School District*, 501 F.2d 1264, 1269 (9th Cir. 1974); *Eslinger v. Thomas*, 476 F.2d 225, 230-231 (4th Cir. 1973); *Green v. Waterford Board of Education*, 473 F.2d 629 (2nd Cir. 1973), *Women's Liberation Union of Rhode Island v. Israel*, 379 F. Supp. 44, 49-50 (D.R.I. 1974), *aff'd.* 512 F.2d 106 (1st Cir. 1975), *Eskra v. Morton*, 380 F. Supp. 205, 216-217 (W.D. Wis. 1974), *reversed on other gds.*, 524 F.2d 9 (7th Cir. 1975); *O'Neil v. Dent*, 364 F. Supp. 565, 578 (E.D.N.Y., 1973); Gunther, *The Supreme Court, 1971 Term Forward: In Search of Evolving Doctrine on a Changing Court: A Model For a Newer Equal Protection*, 86 Harv. L. Rev. 1 (1972).

Weber, 406 U.S. at 175, to articulated and legitimate governmental purposes.[16]

Subsequent decisions, then, from *Reed* and *Weber* through *Jimenez*, have undermined the validity of the standard of review utilized by the majority in *Labine*. *Weber v. Aetna Casualty Company* subsequently engaged in a rigorous analysis of an illegitimacy-based classification, and narrowed *Labine* substantially. The fact that *Labine* is not even mentioned in *Gomez v. Perez*, *N.J.W.R.O. v. Cahill* and *Jimenez v. Weinberger*, *supra*, while admittedly legitimate governmental interests were rejected as insufficient justification for the discriminations against illegitimate children, can only be taken as further evidence of the demise of the rationales, at the least, of the *Labine* decision.

One last factor that isolates *Labine*, radically distinguishing it from all the other illegitimacy cases and from this case, should be noted. In this and other contexts, this Court has closely scrutinized total exclusions of groups of children or families from statutory coverage, while taking a more lenient view in cases involving the relative quality and level of

[16]*Reed v. Reed*, 404 U.S. 71, 75-76:

> The Equal Protection Clause of that Amendment does, however, deny to states the power to legislate that different treatment be accorded to persons placed by statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Royster Guano v. Virginia*, 253 U.S. 412, 415 (1920).

inclusions.[17] In all of the other illegitimacy cases the Court has struck down total exclusions from governmental benefits or other statutory coverage. In *Labine*, by virtue of the unusual Louisiana law, all minor illegitimate children had a substantial and enforceable permanent right to support against the estate. *See* 401 U.S. at 533, 534 n.2. An illegitimate child in Illinois, like Deta Mona Trimble, on the other hand, is left with no rights after the father's death. She is excluded from *any* statutory protection, like the children in *Weber, Gomez, Jimenez, N.J.W.R.O., et al.*

In sum, this Court should subject the statute to close scrutiny. Moreover, as the next section will show, there is no justification whatsoever for the statutory discrimination. *Labine* should be explicitly overruled. If not overruled, it should be at least distinguished and confined, so that illegitimate children, at a minimum, receive equal rights in intestacy with legitimate children, whenever their paternity has been adjudicated by a state court or otherwise determined to the satisfaction of the State.

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[17]Compare, e.g., *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Jimenez v. Weinberger*, 417 U.S. 620 (1974); *N.J.W.R.O. v. Cahill*, 411 U.S. 619 (1973); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd.* 409 U.S. 1069 (1972); and *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd.* 409 U.S. 1069 (1972), with *Dandridge v. Williams*, 397 U.S. 471 (1971). See also *Labine*, 401 U.S. at 535-536, distinguishing *Levy v. Louisiana*, 391 U.S. 68 (1968): "Under those circumstances the Court [in *Levy*] held that the State could not *totally* exclude from the class of potential plaintiffs illegitimate children. . ." (Emphasis added).

II.

THE INVIDIOUS DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN IN THE ILLINOIS PROBATE ACT IS NOT SUBSTANTIALLY OR RATIONALLY RELATED TO ANY LEGITIMATE STATE PURPOSE AND DENIES APPELLANTS EQUAL PROTECTION OF THE LAW.

In this case the Illinois Supreme Court has relied on *In Re Estate of Karas*, 61 Ill. 2d 40 (1975), which in turn relied on *Labine v. Vincent*, 401 U.S. 532 (1971). In so doing, the Illinois Supreme Court offered three possible state interests furthered by the statutory provisions of the Probate Act which deny illegitimate children the right to inherit from fathers who die intestate, while granting intestate succession rights to legitimate children. The Illinois Supreme Court did not adequately address the arguments that Deta Mona Trimble's case, in particular, presented very different questions than either *Labine* or *Karas* and that the Illinois statute is substantially different from the unique Louisiana scheme at issue in *Labine*. Moreover, as will be shown, the "justifications" put forward by the Illinois Supreme Court do not serve any legitimate or rational state interest, much less do they suffice to meet strict scrutiny or the scrutiny required by this Court's decision subsequent to *Labine*. When examined under the analysis developed in more recent cases, each of the posited rationales is seen to have been abandoned by this Court and/or other courts, while none of the posited purposes is furthered, significantly or otherwise, by the classification at issue.

Therefore, under any standard of review applicable to these classifications based on legitimacy of birth, the

statute violates appellants' right to equal protection of the law.

A. THE DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN FAILS TO SUPPORT ANY LEGITIMATE STATE INTEREST IN PROTECTING AND STRENGTHENING FAMILY LIFE.

The first rationale offered to support these classifications is the state interest "in the promotion of family relationships," *Karas*, 61 Ill. 2d at 48, one of the interests mentioned by the *Labine* court as being a function committed to the states. *Labine* 401 U.S. at 538. The Illinois court neither elaborated on the nature and scope of this interest, nor attempted to explain the relationship to the Probate Act's discriminatory provision to this interest; the court merely cited *Labine*, and stated that the Illinois statutes further the same objective. *Labine* also did not scrutinize the relationship between the classification at issue and the state purpose allegedly furthered thereby. As will be shown, moreover, this rationale has been abandoned in later cases as inappropriate in considering discrimination against innocent illegitimate children, an abandonment not considered in *Karas*.

Assuming, *arguendo*, that a permissible state interest in promoting and strengthening family life may be discerned in the Probate Act, the classification contained in § 12 promotes this interest, if at all, in a manner offensive to the Constitution. This rationale assumes that in this context sanctions directed against the offspring will somehow discourage the parents from engaging in non-marital relations. This assumption has

been seen by the Court to be irrational and contrary to valid conceptions of human behavior. Even if such a sanction were effective, moreover, it would be impermissible. The fundamental precept that legal benefits and burdens be related to merit and responsibilities is incorporated in the prohibition of the Equal Protection Clause against classifications unrelated to any legitimate state purpose. Section 12 of the Probate Act defies this elementary concept of fundamental fairness; it acts to penalize an innocent child, who is powerless either to prevent the conduct at which the statute is directed or to alter the status of her birth.

While repeatedly invalidating, on Equal Protection grounds, statutes which discriminate against illegitimate children, this Court has noted, in the strongest possible language, that to vent society's opprobrium toward "irresponsible liaisons" on the offspring of the liaison is "illogical and unjust." *Weber*, 406 U.S. 164, 175. More specifically, *Weber* rejected the rationality of any assumption that denying benefits to illegitimate children (or even their parents) will discourage illicit relations among the parents:

> The Louisiana Supreme Court emphasized strongly the State's interest in protecting "legitimate family relationships," 257 La. at 433, 242 So.2d, at 570, and the regulation and protection of the family unit have indeed been a venerable state concept. We do not question the importance of that interest; what we do question is how the challenged statute will promote it. As was said in *Glona*:
>
> > "[W]e see no possible rational basis. . .for assuming that if the natural mother is allowed recovery for the wrongful death of her illegitimate child, the cause of illegitimacy

> will be served. It would, indeed, be farfetched to assume that women have illegitimate children so that they can be compensated in damages for their death." *Glona v. American Guarantee and Liability Insurance Co., supra,* at 75
>
> Nor can it be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation. *Weber,* 406 U.S. at 173.

In short, *Weber* concluded that "the state interest in legitimate family relationships is not served" by a statute which penalizes the child, "an ineffectual–as well as unjust–way of deterring the parent." 406 U.S. at 175-176.[18]

This portion of *Weber* was applied in *Eskra v. Morton,* 380 F. Supp. 205, 217 (W.D. Wis. 1974), in considering a federal statutory scheme which incorporated Wisconsin's probate code insofar as it disinherited illegitimate children:

> An explicit statement of the deterrent theory would be: that men or women would refrain from engaging in non-marital intercourse if they were aware that children so conceived would be barred from heirship in the estate of their mothers' parents, siblings, aunts, uncles and other lineal and collateral kindred. *Weber* appears to be decisive on this point. If it "can [not] ... be thought that persons will shun illicit relations because the offspring may not one day reap the benefits of workmen's compensation" (406 U.S. at 173), if

[18]Rather than punishing the child there exist alternative means to "promote family life" which would burden or encourage the parent alone. *See* Krause, "Protection for the Illegitimate," 65 Mich. L. Rev. 477, 493-495 (1967).

> penalizing an illegitimate child by withholding workmen's compensation benefits from the child is "an ineffectual–as well as unjust–way of deterring the parent" from extra-marital intercourse (406 U.S. at 175), it seems even more clear that it cannot be thought that such deterrence will be achieved by the rather remote sanction which § 237.06 visits upon illegitimate children.

The Seventh Circuit Court of Appeals agreed with this conclusion, *Eskra v. Morton,* 524 F.2d, 13-14 n. 13 (7th Cir. 1975):

> Significantly, in *Weber,* the Court did not identify the state interest in rules designed to establish, protect, and strengthen family life as a basis for the decision in *Labine,* even though that interest had been mentioned in the *Labine* opinion itself, *see* 401 U.S. at 538, 92 S. Ct. 1400, and had provided the first justification for the statute identified by Judge Tate in his opinion for the Louisiana Court of Appeals. *See Succession of Vincent,* 229 So. 2d 449, 452 (1970). In part II of its opinion in *Weber,* the Court expressly rejected that interest as justifying a discrimination against illegitimates claiming the benefits of Workmen's Compensation. *See* 406 U.S. at 173-174, 92 C. St. 1400. The existence and importance of that state interest is unquestioned. What is questionable is whether that interest is served by a statutory discrimination against an illegitimate child. There appears to be no serious claim that these laws–any more than the criminal abortion statutes–have been effective in forestalling the conduct which creates illegitimate children. *See Roe v. Wade,* 410 U.S. 113, 148, 93 S. Ct. 705, 35 L. Ed. 2d 147. Moreover, even if we make the dubious assumption that the discrimination against illegitimates tends to deter parental misconduct, we do not believe that the Court would regard the punishment of

innocent persons as an acceptable form of deterrence.[19]

This Court's opinion in *N.J.W.R.O. v. Cahill,* 411 U.S. 619 (1973), represents a repudiation of the "promotion of family life" rationale equally as strong as *Weber.* New Jersey had adopted a state-funded welfare program specifically designed to aid "Families of the Working families as units, and despite the not unreasonable assumption that conditioning the receipt of such assistance upon the existence of a traditional family might encourage unmarried couples with children to marry, this Court, quoting from *Weber,* rejected the argument as unrelated to the needs and interests of the children involved. 411 U.S. 619, 621. If classifications based on illegitimacy could bear no rational relationship to the promotion of family life in the context of New Jersey's "Assistance to Families of the Working Poor," where the impact on the adult individuals who could conceivably remove the disabilities imposed on them (as cohabiting parents and applicants for assistance) as well as their children was quite direct, then the classifications in the Illinois Probate Act, which affect only the illegitimate child, who is powerless to change his status, obviously could never be found to bear any relationship, let alone a rational one, to the state

[19]*See also Miller v. Laird,* 349 F. Supp. 1034, 1045 (D.D.C. 1972); *Williams v. Richardson,* 347 F. Supp. 544, 549 (W.D.N.C. 1972); *Griffin v. Richardson,* 346 F. Supp. 1226, 1234-5 (D.Md. 1972), *aff'd.* 409 U.S. 1069 (1972); *Morris v. Richardson* 346 F. Supp. 494, 498-499 (N.D. Ga. 1972), *vacated* 593 (D. Conn. 1972), *aff'd.* 409 U.S. 1069 (1972); *In re Estate of Jensen,* 162 N.W. 2d 861, 878 (Supreme Ct. of N. Dakota, 1968).

objective of encouraging marriage and promoting family relationships.

Moreover, whatever marginal validity the "promotion of family life" rationale may have had with respect to the complex provisions of the Louisiana Civil Code, which consistently denied to illegitimate children rights which were accorded to legitimate children,[20] no consistent goal of promotion and preservation of a particular style of family life is remotely discernible in the Illinois statutory scheme. Illinois does not, as does Louisiana, equivalently limit an illegitimate child's rights to inherit from his mother.[21] In short, the Illinois Probate Act, by failing to provide consistent sanctions, as does Louisiana, does not even consistently purport to meet the impermissible goal of punishing the child in order to encourage the formalization of the parents' relationship.

Finally, the actual family ties of the unmarried parents and the child must be considered. The Louisiana scheme at issue in *Labine* is further distinguished by its partial promotion of family ties between the parent and child through the provisions of support rights, against the estate, for all illegitimate children; Illinois, on the other hand, has no specific provision allowing illegitimate children support from the estate of a decedent father. In Louisiana all illegitimate children received some form of protection. "Natural

[20]Louisiana Civil Code, Articles 198, 200, 202, 206, 242, 918-920.

[21]*Compare* Louisiana Civil Code, Art. 918, which allows an illegitimate child to inherit from his mother only if he has been acknowledged and if the mother dies leaving no other descendants, *with* Ill. Rev. Stat., ch. 3, § 12.

children" had limited rights in intestacy. Both "natural children" and the other defined group of illegitimate children, "bastards," had a right to claim support against the heirs-at-law including legitimate children. La Civ. Code Ann., Art. 240. Both the majority opinion (401 U.S. at 533) and Justice Harlan's additional concurring remarks (401 U.S. at 540) in *Labine* noted this support right. An illegitimate child in Illinois, on the other hand, is left unprotected after the death of his father, even where, as here, the father had acknowledged and was supporting the child pursuant to court order, and had no spouse or legitimate children. Illinois is inconsistent in its treatment of whatever relations do exist among mother, father, and child and both assumes no father-child relationship and burdens the mother-child relationship (see Sections III and IV, *infra*). The Illinois scheme thereby disrupts family life, because the

> . . .illegitimate child may suffer as much from the loss of a parent as a child born within wedlock. . .So far as this record shows, the dependency and natural affinity of the unacknowledged illegitimate children for her father were as great as those of the four legitimate children whom Louisiana law has allowed to recover. The legitimate children and the illegitimate child all lived in the home of the deceased and were equally dependent upon him for maintenance and support. *Weber*, 406 U.S. at 169-70.[22]

[22] *See also, Stanley v. Illinois*, 405 U.S. 645 (1972), where the Court gave recognition and constitutional protection to the basic legal and practical relationship between an illegitimate child and the father.

In short, this Court no longer will countenance a state "promoting" family relationships by punishing blameless illegitimate children. The Illinois Supreme Court erred by reaching back to this abandoned portion of *Labine*. Moreover, Illinois has an inconsistent scheme which burdens and thwarts family relationships between the child and his biological parents, in violation of decisions of this Court.

B. THE DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN FAILS TO SUPPORT ANY STATE INTEREST IN THE STABILITY OF LAND TITLES AND THE PROMPT AND DEFINITIVE DETERMINATION OF THE OWNERSHIP OF PROPERTY LEFT BY DECEDENTS.

The second rationale proferred by the Illinois Supreme Court to support the statutory provision is the obvious state interest in providing for the prompt and definitive determination of the ownership of property left by decedents, and specifically "prohibiting spurious claims." *Karas*, 61 Ill.2d at 48, 52-53. This was the factor cited in *Weber*, 406 U.S. at 170, as the rationale for *Labine*.

At the outset, it must be pointed out that the Illinois Supreme Court's reliance here on *Karas* and thereby *Labine* is somewhat disingenuous. Sherman Gordon was adjudicated to be Deta Mona Trimble's father by an Illinois Court in a paternity action brought pursuant to Ill.Rev.Stat., Ch. 106 3/4 § 51 *et seq*. The children in *Labine* and *Karas* had not been so adjudicated. *Labine* is completely inapposite on this point. Whatever validity the "prevention of spurious claims" or "difficulty of proof of paternity" or "stability of land titles" or

"prompt and definitive devolution of property" rationale may have in other contexts, it is simply inapplicable to a child whose paternity was definitively established by court decree prior to the death of her father.[23] Deta Mona Trimble has already definitively become her father's child for virtually all legal purposes. In that status her inheritance rights would neither create litigation nor delay nor complicate the disposition of her intestate father's property. She is, simply, his proven child, and Illinois "may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." *Gomez v. Perez*, 409 U.S. 535, 538 (1973).

Even in the broader context where there may be some minor proof problems, the interest in quick and definitive property disposition is insufficient to justify discrimination against illegitimate children. *Reed v. Reed*, 404 U.S. 71,76 (1971) directly rejected this interest as a sufficient justification for discrimination in the identical context of administration of estates:

> Clearly the objective of reducing the workload on probate courts by eliminating one class of contests is not without some legitimacy . . . [But to] give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment.

[23]Illinois places enough confidence in paternity judgments to use such adjudications as a basis for subjecting to criminal penalties a father who does not support the child. Ill.Rev. Stat., ch. 68 § 24.

This Court, in cases involving discrimination against illegitimate children, against women, and in other areas where close scrutiny is involved, has not tolerated general and over-inclusive prophylactic rules which avoid the need for individualized determinations.[24]

As stated in *Gomez v. Perez*, 409 U.S. 535, 538:

> . . . there is no constitutionally sufficient justification for denying such an essential right to a child simply because its natural father has not married its mother. For a state to do so is "illogical and unjust." [*Weber*, at 175] We recognize the lurking problems with respect to proof of paternity. Those problems are not to be lightly brushed aside, but neither can they be made into an impenetrable

[24]*Compare Turner v. Dept. of Employment Security*, ____ U.S. ____, 96 S.Ct. 249 (1975); *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Stanley v. Illinois*, 405 U.S. 645 (1972); *Reed v. Reed*, 404 U.S. 71 (1971) *with Weinberger v. Salfi*, 422 U.S. 749 (1975). As stated in *Stanley*, 405 U.S. at 656-657:

> The establishment of prompt efficacious procedures to achieve legitimate state ends is a proper state interest worthy of cognizance in constitutional adjudication. But the Constitution recognizes higher values than speed and efficiency. Indeed, one might fairly say of the Bill or Rights in general, and the Due Process Clause in particular, that they were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy that may characterize praiseworthy government officials no less, and perhaps more, than mediocre ones. Procedure by presumption is always cheaper and easier than individualized determination. But when, as here, the procedure forecloses the determinative issue of competence and care, when it explicitly disdains present realities in deference to past formalities, it needlessly risks running roughshod over the important interests of both parent and child. It therefore cannot stand. [footnotes omitted.]

> barrier that works to shield otherwise invidious discrimination. *Stanley v. Illinois*, 405 U.S. 645, 656-657 (1972); *Carrington v. Rush*, 380 U.S. 89 (1965).

See also Jimenez v. Weinberger, 417 U.S. 628 (1974).

This Court's later decisions in the illegitimacy cases thus establish that the court is not unmindful that illegitimacy occasionally presents a problem of proof of paternity, and that the Court will give limited deference to the state or federal government's method of determining the validity of individual claims so long as the claim can be presented on an equal basis by illegitimate children.[25] But they also unequivocally establish that once paternity is determined, the Constitution requires that all children – whether legitimate or illegitimate – be treated equally, and that

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[25] An example of a probate statute which provides satisfactory standards for determining the validity of individual claims while eliminating invidious discrimination against illegitimate children is the Uniform Probate Code, adopted by 10 states (*See* Appendix to this brief), which provides as follows:

> If, for purposes of intestate succession, a relationship of parent and child must be established to determine succession by, through, or from a person,
>
> * * *
>
> (2) In cases not covered by (1), a person born out of wedlock is a child of the mother. That person is also a child of the father, if:
>
> (i) the natural parents participated in a marriage ceremony before or after the birth of the child, even though the attempted marriage is void; or
>
> (ii) the paternity is established by an adjudication before the death of the father or is established thereafter by clear and convincing proof . . .

Uniform Probate Code, Article 2-109.

the problems of proof connected with paternity do not mean that a "blanket and conclusive exclusion of a subclass of illegitimates is reasonably related to the prevention of spurious claims." *Jimenez v. Weinberger*, 417 U.S. 628,636 (1974).

In summary then, the concerns expressed in *Labine* respecting problems of proof, stability of land titles and prompt and definitive determination of the ownership of property have no applicability to those illegitimate children whose paternity has been adjudicated prior to the father's death. Moreover, these problems have, in the later illegitimacy cases before this Court, been found insufficient to support discrimination against any illegitimate children. And in *Reed, supra*, these concerns were found insufficient, in virtually the same statutory context as *Labine*, to support otherwise invidious discrimination.

C. THE DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN CAN NOT BE JUSTIFIED ON THE BASIS THAT IT RAISES NO INSURMOUNTABLE BARRIER TO INHERITANCE.

The Illinois Supreme Court in *Karas*, again drawing from *Labine*, attempted to justify the provisions of the Probate Act on the basis that they raise no "insurmountable barrier" to inheritance by an illegitimate child since the father could write a will. 61 Ill.2d at 52. Properly speaking, this isn't a rationale at all, but simply an attempt to disparage the impact the classifications have on illegitimate children. If the classifications further no legitimate state purpose, the

fact that they raise no "insurmountable barrier" to inheritance would hardly render them constitutional.

In *Reed v. Reed*, 404 U.S. 71 (1971), this court examined an Idaho law which, in regulating the disposition of an intestate decedent's property, discriminated against women. The statute was found to violate the Equal Protection Clause, even though, logically, the statutory preference to the male in issuing letters of administration of a person dying intestate could also have been altered by the decedent writing a will. Similarly, a statute giving preferences based on sex, race, religion, or some other arbitrary factor, in the actual devolution of property in intestacy would presumably be unconstitutional, even though the deceased would have faced no insurmountable barrier to writing a will and altering that disposition.

The options of the parents are not the crucial factor, as was recognized in *Weber*, 406 U.S. at 175 and *Jimenez*, 417 U.S. at 632, where this court held that "imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual responsibility and wrongdoing."[26] The action or inaction of the parent can not lead to the imposition of penalties on the child. See Section II-A, *supra*.

As the Seventh Circuit Court of Appeals said in the recent illegitimacy case involving intestate succession:

> We have some difficulty in evaluating the importance of the options open to the parents, since from the point of view of the child it really

[26]*See also N.J.W.R.O. v. Cahill*, 411 U.S. 619, 620; *Griffin v. Richardson*, 346 F.Supp. 1226, 1237, *aff'd.* 409 U.S. 1069 (1973).

> makes no difference whether options were nonexistent or simply not exercised.

Eskra v. Morton, 524 F.2d 9, 15 (7th Cir., 1975).

In short, the suggestion that an "insurmountable barrier" must be present before a violation of Equal Protection can be found is not borne out by the Equal Protection cases, much less by the illegitimacy cases. In the instances in which this Court has struck down discrimination against illegitimate children, there was normally some action that one parent or both parents could take or could have taken, whether it was marriage, acknowledgment, or even adoption, which would have altered the child's position.[27] These options did not suffice to justify the otherwise invidious discrimination.

Even if the "insurmountable barrier" rationale had general validity, it would be unavailable here. Sherman Gordon was a 28 year old man of marginal economic resources who died the victim of a homicide. Any legislative presumption that he could have left a will is unrealistic. In fact, as demonstrated by three studies on the subject, only about 15% of the adult American population, as a whole, leave wills. Specifically, one study, involving the first 500 adult residents of Cook

[27]The suggestion in *Labine*, 401 U.S. at 549, that in *Levy* there was an insurmountable barrier is incorrect. The child's position in *Levy* and *Glona* could have been altered by an acknowledgment. *See Glona v. American Guarantee Co.*, 391 U.S. 73, 79 (Harlan, J., dissenting). *See also N.J.W.R.O. v. Cahill*, 411 U.S. 619 (1973) and, in a more general context, *In re Griffiths*, 413 U.S. 717 (1973), where in spite of the fact that the alien could have applied for citizenship, the Court applied strict scrutiny. (Rehnquist, J., dissenting, 413 U.S. at 657).

County, Illinois who died in 1957, reveals that while 14.6% of these decedents had estates probated, of the decedents in the 20-29 age group of Sherman Gordon, none had estates probated, apparently because persons in that age group generally have limited property to probate.[28] Professor Dunham also found that in the occupational group of service employees, to which Sherman Gordon belonged as a porter at an automobile dealer, there were 55 decedents in his sample, 9 of whom had intestate estate proceedings, but not one of whom died with a will.[29] Considering these statistics, it would obviously be irrational for the legislature to conclude that any decedent, let alone one in circumstances comparable to those of Sherman Gordon, could, or would be likely to leave a will which might remove disabilities imposed on an illegitimate child. Much less does such a presumption justify discriminatory state action against the illegitimate child.

D. THE DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN MAY NOT BE JUSTIFIED BY THE PRESUMED INTENT OF THE DECEDENT.

The opinion below articulated no other state purposes served by the statutory classifications against

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[28] Allison Dunham, *The Method, Process and Frequency of Wealth Transmission At Death*, 30 Univ. of Chicago L.Rev. 241 (1963); *See also* Edward H. Ward and J.H. Beuscher, *The Inheritance Process In Wisconsin*, 1950 Wis.L.Rev. 393 (1950); Richard R. Powell and Charles Looker, *Decedent's Estates: Illumination From Probate and Tax Records*, 30 Col.L.Rev. 919 (1930) at 924.

[29] Dunham, *supra* at 245, table 3.

and among illegitimate children embodied in Sec. 12 of the Probate Act, nor does the Act itself articulate any objectives. It has been argued, however, that the purpose of any intestate succession statute is to effectuate the presumed intent of the decedents as to the disposition of their estates. In this context, it might be suggested that these classifications serve that purpose, that men presumptively do not want their illegitimate children to inherit from them. Even if the Court below, or the statute itself, had articulated such a purpose, the statute could not be found constitutional. This rationale is similar to an implication (tied to the argument discussed earlier that there is no insurmountable barrier) that the failure of intestate decedents to make a will merely aligns the statutory disposition of the property with the decedent's intent. That argument is untenable, and can not justify the action of the *state* in discriminating against illegitimate children. Indeed, the very core of the Fourteenth Amendment is its prohibition against discrimination by the state, as opposed to discrimination by private parties. As the Seventh Circuit recently stated:

> In our judgment, the presumed intent of intestate decedents is an unacceptable justification for a decision by the state which the state would otherwise be unable to justify. It is unacceptable, not because it is irrational to assume that there are significant numbers of private citizens who would intentionally punish children for the transgressions of their parents, but rather because such motivation on the part of the state is offensive to our concept of due process. In some communities it would not be unrealistic to assume that most decedents would discriminate in favor of, or against, members of a particular religious sect,

> race, political party, or perhaps even sex. But surely the state may not, for that reason alone, make comparable discriminatory choices. Just as private schools or private hospitals may place some arbitrary limits on the classes of people they will serve, so may testators make irrational choices in the distribution of their property. But when the choice is made by the government, the obligation to afford all persons equal protection of the laws arises.

Eskra v. Morton, 524 F.2d 9, 14 (7th Cir., 1975). *See also Evans v. Newton*, 382 U.S. 296 (1966); *Reed v. Reed*, 404 U.S. 71 (1971).

Moreover, even if "presumed intent" were a legitimate state purpose, any presumption by the state that fathers do not wish to leave property to illegitimate children is too speculative to be supportable.[30] In fact, a public opinion survey taken in Illinois indicates that a vast majority believe that an illegitimate child should have the same intestate succession rights accorded to legitimate children.[31]

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[30] *See U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528 (1973).

[31] A carefully selected cross-section of over 2000 persons were asked to choose one of the following alternatives:

a. Unless the father leaves a will in which he specifically gives his illegitimate child an inheritance, the illegitimate child should have no right to inherit from its father.
b. If the father does not leave a will, the illegitimate child should inherit from its father the same inheritance to which the child would be entitled if it were of legitimate birth.
c. If the father does not leave a will, the illegitimate child should inherit from its father enough to cover support needs until the child is able to go to work and earn its own living.

Of the persons asked, 64 percent stated they believed illegitimates should receive the same inheritance as legitimate children. Only 5 percent responded that illegitimates should get no inheritance. H. Krause, *Illegitimacy: Law and Social Policy*, pp. 318-20 (1971).

E. CONCLUSION: THE DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN IN THE ILLINOIS PROBATE ACT IS NOT RATIONALLY RELATED TO ANY VALID STATE PURPOSE, AND DENIES APPELLANTS EQUAL PROTECTION OF THE LAW UNDER ANY STANDARD OF REVIEW ADOPTED BY THIS COURT.

Every conceivable purpose offered in *Karas* and *Labine* to support the classification against illegitimate children in the Probate Act has been examined, and the classifications have not been rationally related to any of them. Certainly, under the more stringent standards of review that should be applied here, no justification exists for the Probate Act's distinction by legitimacy of issue; the critical link between classification and valid state purpose cannot be forged. Even under the most minimal standards of review, there is no rational basis for the State of Illinois affirmatively disinheriting illegitimate children whose paternity has been established. At the same time, the statute at issue affirmatively undermines ancillary state functions, including the imposition of support obligations, as will be discussed in the next two sections.

Deta Mona Trimble is Sherman Gordon's daughter and has been determined as such by the Illinois state courts. Their relationship was identical to that of any father and daughter. Nevertheless the Illinois Probate Act arbitrarily erects barriers based on the status of legitimacy of birth, excluding her from inheritance rights solely because she was born and remained "illegitimate." This statutory scheme offends any rudimentary conception of fundamental fairness. It is offensive to the beneficent command contained in the

phrase equal protection of laws–that like be treated alike–which forbids invidious discrimination of the type contained in the Probate Act. It is, as this Court has so frequently recognized, "illogical and unjust" to wreak the perceived sins of the parents on the head of an innocent child. *Weber*, 406 U.S. at 175-176.

III.

THE DISCRIMINATION AMONG ILLEGITIMATE CHILDREN PRESENT IN THIS CASE IS IRRATIONAL AND VIOLATES THE EQUAL PROTECTION CLAUSE.

The Louisiana scheme at issue in *Labine*, pernicious though it was, at least had some internal consistency. Louisiana did not, as does Illinois, discriminate among illegitimate children on the basis of the deceased parent's sex. Louisiana did not, as does Illinois, cut off many illegitimate children from all rights to the estate. The Illinois statute's constitutionality in these respects must be judged not under *Labine*, but under *Jimenez v. Weinberger*, 417 U.S. 628 (1974), and *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975), which are directly applicable here.

The decisions in cases from *Weber*, *supra*, through *Jimenez* reveal that both the standard of review articulated in *Labine* and the rationales offered therein to support the classification of children by legitimacy of birth in Louisiana's Probate Code have been repudiated, at least by implication, by this Court. The decision of the Illinois Supreme Court in this case, on the other hand, unjustifiably expands *Labine* by applying it to an entirely different statutory scheme. In

Labine the Court upheld certain complex and unique Louisiana provisions defining the rights of children. Illegitimate children are divided into two classes, "natural children" who must be acknowledged and whose parents must have been capable of marrying at the time of their conception, and "bastards," who are defined as all unacknowledged illegitimate children and those whose parents were incapable of contracting marriage at the time of their conception. Louisiana Civil Code, Article 202. The latter class is barred from inheriting from either parent, while "natural children" are granted limited rights of succession to the estate of either parent. *Id.*, Articles 918-920. Most important, Louisiana also specifically provided for support payments, in the form of "alimony," for *all* illegitimate minor children, from either parent, and from the estate left by either parent, even where the parent dies intestate. *Id.*, Articles 240-242. This last provision minimizes the negative impact of Louisiana's policies on the innocent children. The provision was noted in *Labine*, 410 U.S. at 533, 540.

The differences in Illinois are striking. First, instead of limiting the right of an illegitimate child to inherit from either parent, as does Louisiana, Illinois not only discriminates against illegitimate children as opposed to legitimate children, but also irrationally bifurcates the group of illegitimate children by sub-classifying invidiously on the basis of the sex of the decedent parent. The Illinois Probate Act mandates that illegitimate children inherit from their mothers in the same manner as do legitimate children. Illegitimate children who survive the deaths of their fathers, however, are absolutely barred from intestate succession. This exclusion applies whether or not the

father formally acknowledged them, supported them, or had been adjudicated, in a paternity or other court action, to be their father. The illegitimate child in Illinois is therefore stripped of the crucial prior protection of support by the death of the father; Illinois takes no steps to eliminate or minimize this impact.

In *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975), this Court invalidated a Social Security Act provision which denied benefits, based on the earnings of a deceased wife and mother, to a widower who had the couple's minor children in his care, while granting such benefits to a similarly situated widow. The Court found that a primary purpose of the challenged provision was to enable children of covered employees to receive the personal attention of the surviving parent. The classification was found to deny equal protection since it, *e.g.*, "discriminates among surviving children solely on the basis of the sex of the surviving parent." 420 U.S. at 651. The Act at issue here does precisely the same thing. And in *Green v. Woodard*, 40 Ohio App. 2d 101, 318 N.E.2d 397 (Ohio Ct. App. 1974), the court found unconstitutional a probate statute identical to that in issue here, on the grounds that it discriminated among illegitimate children based on the sex of the decedent parent. Analyzing *Labine* in light of subsequent decisions such as *Weber* and *Jimenez*, the Court found the intra-class discrimination not reasonably related to the purposes of intestacy statutes.

Second, Illinois has no specific provision allowing minor illegitimate children support from the estate of a decedent parent. In Louisiana all illegitimate children receive some form of protection, as discussed above. Where the father dies intestate, the minor child's right

to support continues. In other words, no action by the father is necessary to confer part of the estate on the minor child. An illegitimate minor child in Illinois, on the other hand, is left unprotected after the death of his father, unless the father takes action to protect the child. This is true even where, as here, the father previously had acknowledged and was supporting the child pursuant to court order. This total exclusion can only be altered by a parental action (*e.g.*, intermarriage or a paternal will) which protects the illegitimate child. Thus, unlike Louisiana, Illinois denies *all* rights to those among illegitimate children whose fathers took no affirmative action. Illinois thus punishes the child twice for the parents' failures: once, by stigmatizing him as an illegitimate child; and again, by terminating all rights against the estate, including support rights, because the father has taken no affirmative action.

These arbitrary categorizations among illegitimate children make the Illinois Supreme Court's total reliance on *Labine* even more inappropriate. Rather, *Jimenez v. Weinberger*, 417 U.S. 628 (1974), this

Court's most recent opinion on the subject of discrimination based on legitimacy, is applicable.[32]

The Illinois statute at issue here not only was the basis of the Social Security Act provision struck down in *Jimenez*, but is analogously structured to discriminate *among* illegitimate children as well as against them. While *Labine* dealt with distinctions between legitimate and illegitimate children, *Jimenez* grappled with the present scheme, which mixes an intent to discriminate against illegitimate children with an arbitrary sub-classification of illegitimates. The discrimination among illegitimate children, cumulative with the discrimination against illegitimate children, was

[32] Although *Jimenez* was concerned with classifications in the Social Security Act, the *Jimenez* children were actually barred from Social Security benefits by the operation of Ill. Rev. Stat., Ch. 3, Sec. 12, the statute contested here:

> Since the parents never married, appellants are classified as illegitimate children *under Illinois law and are unable to inherit from their father* because they are non-legitimated illegitimate children. Ill. Ann. Stat., Ch. 4 [*sic*], § 12.
>
> * * *
>
> The contested Social Security scheme provides, in essence, that legitimate or legitimated children (42 U.S.C. § 402(d)(3)), *illegitimate children who can inherit their parent's personal property under the intestacy laws of the State of the insured's domicile* (42 U.S.C. § 416(h)(2)(A)) . . . are entitled to receive benefits without any further showing of parental support. However, illegitimate children such as Eugenio and Alicia . . . who do not fall into one of the foregoing categories, are not entitled to receive any benefits. *Jimenez*, 417 U.S. at 630, 631 n.2 (emphasis supplied).

Similarly, *Eskra v. Morton*, 524 F.2d 9 (7th Cir. 1975), invalidated a federal statutory denial of inheritance rights to an illegitimate Indian child based on a Wisconsin statute analogous to the statute contested here.

found to be unconstitutional, being under-inclusive and over-inclusive. *Jimenez*, 417 U.S. at 637. Here the Probate Act is similarly under-inclusive, in the types of illegitimate children to whom it gives *some* protection and coverage; and it is over-inclusive in its sweeping prohibition against inheritance from the intestate father, apparently theoretically based on an excessively broad prophylactic rule aimed at proof problems. (See Section II-B, *supra.*) Nor is this discrimination rationally related to any permissible purposes. See Section II, *supra.* Rather, it unconstitutionally burdens the relationship of the child to the mother.

At the same time, the statute at issue undermines ancillary state functions. Under Illinois law, the father of a child born out of wedlock has a support obligation to the child identical to that of the father of a legitimate. *E.g.*, Ill. Rev. Stat., Ch. 23, Sec. 2-11 *et seq.*, Ill. Rev. Stat., Ch. 68, § 24 and § 50 *et seq.* Sherman Gordon was obligated to support Petitioner Deta Mona Trimble. Illinois law demanded no less, explicitly rejecting any distinction in this context between the fathers of legitimate children and fathers of illegitimate children. The law regarding support recognizes the obvious–that legitimate and illegitimate children alike share the same need for support, maintenance, and education. The intestate laws, however, defy this elementary proposition. Gordon's only child's need for support did not terminate on May 28, 1974, but the intestate law illogically decrees that his assets be distributed where there is no such legally cognizable need.

IV.

THE ILLINOIS PROBATE ACT INVIDIOUSLY DISCRIMINATES AGAINST WOMEN IN VIOLATION OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

Appellants here have also been harmed by the discrimination on the basis of sex embodied in Section 12 of the Illinois Probate Act. Under Illinois law, both the father and mother of a child, including an illegitimate child, have a variety of duties, including a duty to support the child. E.g., Ill. Rev. Stat., Ch. 23, Sec. 10-2; Ill. Rev. Stat., Ch. 68, Sec. 24; Ill. Rev. Stat., Ch. 106-3/4, Sec. 52. When one parent dies, the surviving parent obviously retains moral and legal duties to nurture, support and care for the child, and, as a practical matter, the burden of the legal duty becomes greater because it is no longer shared. Yet, despite the clear economic disadvantage of surviving mothers (compared to surviving fathers) as discussed below, existing law gives preference to and assistance in meeting these obligations to the surviving father. This discrimination on the basis of sex violates the equal protection rights of both the mother and the children. Again, this issue and this discrimination were not present in *Labine*, where the child had a right to support, yet no right to inherit, from the estates of both the father and mother.

The statute accomplishes this discrimination by providing that when the mother of the illegitimate child dies intestate, the illegitimate child is the "heir of his mother." Ill. Rev. Stat., Ch. 3, Sec. 12. The father, as the surviving parent, is, therefore, directly assisted in his

ongoing obligations by the fact that the child is legally entitled to money from the estate of the intestate mother. This also would make it easier for him to obtain or retain custody and care of the child. See *Stanley v. Illinois*, 405 U.S. 645 (1972). But when the father of the illegitimate child dies intestate, on the other hand, the child is barred from sharing the estate. The child's mother, his sole surviving parent, therefore has the far more onerous tasks of supporting a child who has no claim against his father's estate and replacing the support previously provided by the father. This will burden or frustrate the mother in obtaining, retaining, or exercising custody and care of the child. The statute therefore discriminates against women by failing to provide for their illegitimate children a legal right to inheritance equivalent to that granted to the illegitimate children of surviving male parents.

As has been mentioned previously, four Justices have declared discrimination against women to be suspect, *Frontiero v. Richardson*, 411 U.S. 677 (1973), but no definitive determination has been reached. Nevertheless, a number of the recent decisions involving discrimination against women have applied a rigorous review. A sex-based classification must "bear a fair and substantial relation" to a permissible articulated state purpose, in probate, as well as in all areas of state action. *Reed v. Reed*, 404 U.S. 71, 76 (1971). Judged by this standard, the classification here, a probate code provision which provides "dissimilar treatment for men and women who are . . . similarly situated," *Reed*, 404 U.S. at 77, denies equal protection of the law to appellants.

Weinberger v. Weisenfeld, 420 U.S. 636 (1975), considered provisions of the Social Security Act which discriminated on the basis of the sex of the surviving

parent. The Social Security Act provisions at issue granted benefits, based on the earnings of a deceased husband and father, to a widow and their children but denied such benefits, based on the woman's earnings, to her widower. The Court held that "The gender-based distinction of 42 U.S.C. Sec. 402(g) is entirely irrational." 420 U.S. at 651.

In the instant case, the negative impact of the statute on women, intertwined with the general economic disadvantage suffered by women, renders it particularly offensive. Recently, this Court upheld a tax preference given to widows but not widowers, stating:

> There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other state exceed those facing the man. Whether from overt discrimination or from the socialization process of a male-dominated culture, the job market is inhospitable to the woman seeking any but the lowest paid jobs.
>
> * * *
>
> We deal here with a state tax law reasonably designed to further the state policy of cushioning the financial impact of spousal loss upon the sex for whom that loss imposes a disproportionately heavy burden. *Kahn v. Shevin*, 416 U.S. 351, 353, 355 (1974).

There can be little doubt that the outcome in *Kahn* would have been different if widowers had been the preferred group. But here, in an analogous situation, the statute *is* doing the opposite of what was approved in *Kahn*. Section 12 of the Illinois Probate Act aggravates, rather than cushions, the financial impact of the death upon the sex for whom the loss imposes a disproportionately heavy burden. As noted in *Kahn*, even when women are able to enter the work force, they are

paid proportionately less than their male counterparts. Female parents left with dependent children after the death of the father are in greater need of financial help in fulfilling their responsibility to support their children than would be men in the same situation. And yet, the statutory scheme challenged here disadvantages women and assists men who are otherwise identically situated.[33] It not only directly disadvantages women in economic terms, it also, as a consequence, differentially burdens the quality and nature of women's relationship with their children. This was specifically recognized in *Weisenfeld*, where the impact of the economic disadvantage was weighed primarily in terms of its effect on the quality of the parent-child relationship. Taking cognizance of the fact that economically disadvantaging the surviving parent forces that parent out of the home, this Court, citing *Stanley v. Illinois*, 405 U.S. 645, 651 (1972), found that the statute burdened the parent in non-economic terms as well, specifically the parent's "constitutionally protected right to the 'companionship, care, custody, and management' of 'the children he has sired and raised, [which] undeniably warrants deference and, absent a powerful countervailing interest, protection.'" *Weinberger v. Weisenfeld*, 420 U.S. at 652.

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[33] As Justice Cadena, dissenting, asked rhetorically in *G____ v. P____*, 466 S.W.2d 41 (Ct. Civil Appeals, Tex. 1971), *reversed sub nom. Gomez v. Perez*, 409 U.S. 535 (1973):

> "May the illegitimate mother complain that she is denied the Equal Protection of the laws because her obligations to her illegitimate child are substantially greater than those imposed on the man who was her partner in the socially disapproved procreative act?" 466 S.W. 2d at 45, n.10.

The Court's ruling that discrimination on the basis of sex between sole surviving parents is irrational is controlling in the case at bar, where discrimination is imposed only on surviving mothers of out of wedlock children, solely on the basis of sex. The rulings in both *Weisenfeld* and *Stanley* on the constitutional protection to be accorded to the parental rights of fathers are directly applicable to the case at bar, since mothers are certainly entitled to no less protection.[34] If the father's relationship to his child, including the illegitimate child in *Stanley*, cannot be differentially burdened by state action, surely the mother's relationship cannot be either.

The statute at issue here thus perpetuates a long-standing invidious discrimination against the mothers of illegitimate children. The most meaningful sense in which the father and mother's relationship to the illegitimate child in our society has been differentiated is in the apportionment of the blame and of the economic obligation:

> "It has often been said that a person born out of wedlock, the parents of that person (the mother much more so than the father), and sometimes the entire family of the mother, suffer a stigma as the result of the nature of the birth . . . . [I]t impairs the social position, not only of the person born out of wedlock, but also the mother, thus constituting for her an obstacle to the realization of a normal life in the community in which she lives." Secretary of the United Nations, *Report:*

[34]See *Weber v. Aetna Casualty Company*, 406 U.S. 164, 172 (1972); *Levy v. Louisiana*, 391 U.S. 68, 71 (1968), discussing the protection of the mother-illegitimate child relationship.

> "The Status of the Unmarried Mother: Law and Practice" 56 (1971).[35]

Thus the statute directly interferes with family relationships. Since it does not bear any rational, fair or substantial relationship to any legitimate state interest, it is completely arbitrary in creating a preference in favor of surviving fathers and against surviving mothers.

CONCLUSION

For the reasons stated, appellants respectfully request that this Court reverse the judgment of the Illinois Supreme Court, and find that: (1) The Illinois Probate Act invidiously discriminates against and among illegitimate children, thereby denying them Equal protection of the Laws as guaranteed by the Fourteenth

[35]Historically mothers of illegitimate children have borne a greatly disproportionate share, compared to the fathers, of the stigma, condemnation, and punishment, as well as of the obligation to support and nurture the child. See also Vincent, "Teenage Unwed Mothers in American Society," XXII, No. 2 The Journal of Social Issues 22, 30-31 (April 1966); Krause, "Equal Protection for the Illegitimate," 65 Mich. L. Rev. 477 (1967).

Amendment, and (2) the Illinois Probate Act invidiously discriminates against appellants on the basis of sex in violation of the Fourteenth Amendment.

Respectfully submitted,

DEVEREUX BOWLY
CHARLES LINN
Legal Assistance Foundation of Chicago
911 South Kedzie Avenue
Chicago, Illinois 60612
(312) 638-2343

JAMES D. WEILL
JANE STEVENS
Legal Assistance Foundation of Chicago
343 South Dearborn Street
Chicago, Illinois 60604
(312) 341-1070

Attorneys for Appellants

APPENDIX A

I. STATES WHICH HAVE THE SAME PROVISION AS ILLINOIS: INHERITANCE FROM FATHER ONLY BY LEGITIMATION.

1. Ala. Code, tit. 16, § 7; tit. 27, § 10 (1958)
2. Ark. Stat. Ann. § 61-141 (1971)
3. D.C. Code Ann. § 19-316 (1973)[1]
4. Ga. Code Ann. § 113-904 (1975); § 74-101, § 74-201 (1973)[2]
5. Hawaii Rev. Stat. § 532-6 (1968)[3]
6. Ky. Rev. Stat. § 391.090 (1972)
7. Mass. Gen. Laws Ann. ch. 190, § 5; ch. 190, § 7 (1969)
8. Miss. Code Ann. § 91-1-15 (1973)[4]
9. Mo. Ann. Stat. § 474.060, § 474.070 (Vernon 1956)
10. N.H. Rev. Stat. Ann. § 561:4 (Supp. 1973)
11. N.J. Stat. Ann. § 3A:4-7 (1953)
12. Pa. Stat. Ann. tit. 20, § 2107 (1975)

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[1] D.C. Code Ann. § 16-2353 (1973) provides for legitimation by intermarriage of parents and acknowlegement by father or by a paternity adjudication.

[2] Ga. Code Ann. § 74-103 (1973), provides for legitimation by petition of father and court order; § 74-201 (1973) defines an illegitimate child as one whose parents do not subsequently intermarry.

[3] Hawaii Rev. Stat. § 338-21 (Supp. 1975) provides three methods of legitimation: (1) by intermarriage of parents; (2) by written acknowledgement of mother and father; or (3) by a paternity adjudication.

[4] Miss. Code Ann. § 91-1-15 (1973) gives the illegitimate child inheritance rights from the father upon intermarriage of the parents and the father's acknowledgement.

13. R.I. Gen. Laws Ann. § 33-1-8 (1970)
14. S.C. Code Ann. § 19-53, § 20-5.1 (1962)
15. Tenn. Code Ann. § 31-107, § 31-205 (1955)
16. Tex. Prob. Code § 42 (1956)
17. Va. Code Ann. § 64.1-5, § 64.1-6 (1973)
18. W.Va. Code Ann. § 42-1-5, § 42-1-6 (1966)
19. Wyo. Stat. Ann. § 2-44 (1959)
20. By judicial construction, Connecticut limits the inheritance rights of the illegitimate child to the maternal line. E.g. *Moore v. Saxton*, 90 Conn.164, 96 A.960 (1916); *Eaton v. Eaton*, 88 Conn.269, 91 A.191 (1914); *Appeal of Atkinson*, 42 Conn.491 (1875); *Inhabitants of Town of Woodstock v. Hooker*, 6 Conn.35 (1825).

II. STATES WHICH HAVE ADOPTED THE UNIFORM PROBATE ACT, WHICH ALLOWS ILLEGITIMATE CHILDREN INTESTATE SUCCESSION RIGHTS FROM AND THROUGH THE FATHER IF: 1) THEY HAVE BEEN LEGITIMATED; OR 2) THERE HAS BEEN AN ADJUDICATION OF PATERNITY PRIOR TO THE FATHER'S DEATH; OR 3) THEY CAN ESTABLISH PATERNITY BY "CLEAR AND CONVINCING EVIDENCE" AFTER THE FATHER'S DEATH.

1. Alaska Stat. § 13.11.045 (1972)
2. Ariz. Rev. Stat. Ann. § 14-2109(2) (1975)
3. Colo. Rev. Stat. Ann. § 15-11-109(b) (1973)
4. Del. Code Ann. tit. 12, § 508 (Supp. 1975)
5. Fla. Stat. Ann. § 732.108(2) (Supp. 1975)
6. Idaho Code § 15-2-109 (Supp. 1975)
7. Mont. Rev. Codes Ann. § 91A-2-109(2) (1975)

8. N.D. Cent. Code § 30.1-04-09(2) (Supp. 1975)
9. S.D. Compiled Laws Ann. § 29A-2-109 (1975)
10. Utah Code Ann. § 74-4-10 (1953); § 75-2-109 (1975)

III. STATES GRANTING SUCCESSION RIGHTS FROM FATHER IF PARENTS INTERMARRY OR IF THERE HAS BEEN AN ORDER OF FILIATION OR PATERNITY ADJUDICATION.

1. Ind. Code § 29-1-2-7 (Burns 1972)
2. N.Y. Est., Powers & Trusts § 4-1.2 (McKinney 1967)

IV. STATES GIVING ILLEGITIMATE CHILD SUCCESSION RIGHTS FROM FATHER IF PARENTS INTERMARRY, OR IF THE FATHER ACKNOWLEDGES THE CHILD, OR IF THERE'S BEEN A PATERNITY ADJUDICATION.

1. Cal. Prob. Code § 255 (Supp. 1975); Cal. Civ. Code § 7000 *et seq.* (Supp. 1975)
2. Kan. Stat. Ann. § 59-501 (1964)
3. Md. Est. & Trusts Code Ann. § 1-208 (1974)
4. N.M. Stat. Ann. § 29-1-18, § 29-1-20 (Supp. 1975)
5. N.C. Gen. Stat. § 29-18, § 29-19; § 49-10, § 49-12 (Supp. 1974)

6. Ore. Rev. Stat. § 109.060, § 109.070, § 112.105 (1975)[5]
7. Vt. Stat. Ann. tit. 14, § 553, § 554 (1974)
8. Wis. Stat. Ann. § 852.05 (1971)

V. STATES GRANTING SUCCESSION RIGHTS FROM FATHER IF CHILD IS LEGITIMATED, OR IF FATHER ACKNOWLEDGES CHILD.

1. Iowa Code § 633.221; § 633.222 (1971)
2. Me. Rev. Stat. Ann. tit. 18, § 1003 (1964)
3. Mich. Comp. Laws § 702.81, § 702.83 (1973)[5]
4. Minn. Stat. § 525-172 (1975)
5. Neb. Rev. Stat. § 30-109 (1964)[6]
6. Nev. Rev. Stat. § 134.170 (1973)
7. Ohio Rev. Code Ann. § 2105.17, § 2105.18 (Baldwin Supp. 1975)
8. Okla. Stat. tit. 84, § 215 (1970)[6]
9. Wash. Rev. Code § 11.04.081 (1967)

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[5] Ore. Rev. Stat. § 109.070(5) (1975) and Mich. Comp. Laws § 702.83 (1973) require acknowledgement by both parents of the putative father's paternity.

[6] Neb. Rev. Stat. § 30-109 (1964) and Okla. Stat. tit. 84, § 215 (1970) provide that an acknowledgement by the father establishes the child cannot represent either father or mother in the collateral or lineal kindred's estate unless the parents intermarry.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

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DETA MONA TRIMBLE and JESSIE TRIMBLE,

Appellants,

v.

JOSEPH ROOSEVELT GORDON, ETHEL MAE KING, WILLIAM GORDON, HELLIE MAE GORDEY, AND MARY LOIS GORDON,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF OF APPELLEE, ETHEL MAE KING

MILES N. BEERMANN
221 North LaSalle Street
Chicago, Illinois 60601
(312) 726-8995

FRED KLINSKY
188 West Randolph Street
Suite 1227
Chicago, Illinois 60601
(312) 346-2280

Attorneys for Appellee, Ethel Mae King

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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BRIEF OF APPELLEE, ETHEL MAE KING

SUMMARY OF ARGUMENT

I. Illinois inheritance laws which prohibit an illegitimate child from inheriting from his father but allowing him to inherit from his mother are reasonably and rationally related to a legitimate state purpose and do not violate the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States.

A. The test for determining whether section 12 of the Illinois Probate Act violates the Equal Protection Clause is whether it bears a rational relationship to a legitimate state purpose. In the area of economics and social welfare a law is not unconstitutional merely because a classification it creates is imperfect, is not made with mathematical nicety or results in some inequality. Since no case dealing with the rights of illegitimate children has held that discrimination against them is "suspect" thus invoking the strict scrutiny test, it is clear that in order for section 12 to be declared valid, it need only bear a rational relationship to a legitimate state purpose.

B. No "right to inherit" is guaranteed by the Constitution, therefore the State of Illinois has a legitimate interest in regulating the disposition of property within its borders that was owned by its citizens who die intestate. That right has been exercised by the legislature in the adoption of the Probate Act which gives citizens of Illinois almost complete freedom of testamentary disposition of their property.

A child, whether legitimate or illegitimate has no right to receive any portion of his parents' estates and may be wholly disinherited, except for a statutory child's award.

The Illinois statutory scheme also provides for the distribution of property of a decedent who dies intestate. Applying the Illinois rules of descent and distribution to the facts of this case, the decedent's estate will be shared equally by his parents, brothers and sisters and the illegitimate child receives nothing.

The purpose of these rules of descent and distribution is to provide an Illinois citizen with a method of disposing of his assets at death without the necessity of

making a will and that has been recognized as a legitimate state purpose by the decision of this Court in *Labine v. Vincent*. The Probate Act has therefore created a "statutory will" to be utilized by those citizens who do not choose to make a will. The power to make a will is in the testator and since the decedent here failed to do so, it must be presumed that he intended to leave his property according to the statutory scheme and thereby disinherit his illegitimate daughter.

Illinois also has a substantial and legitimate interest in seeing that controversies over the property and estates of decedents be speedily and finally determined and that spurious claims of paternity and heirship not be made. That purpose is fulfilled by section 12 of the Probate Act, the effect of which could have been avoided by the decedent here, had he chosen to make a will.

II. The precise issue presented by this case has been previously decided by this Court in *Labine v. Vincent* wherein a Louisiana statute that precluded acknowledged illegitimate children from inheriting equally with legitimate children was declared valid and not violative of the Equal Protection Clause. *Labine* has continuing and present vitality, is dispositive of the issue here and should be followed as controlling precedent.

The *Labine* decision has been followed by the courts in other cases. The doctrine of *stare decisis* would dictate that this Court now follow *Labine* and uphold the validity of the statute in question here.

III. Section 12 of the Illinois Probate Act treats male and female illegitimate children on exactly the same basis and makes no differentiation between them as to inheritance rights. Neither are allowed to inherit

from their fathers and therefore there is no denial of equal protection to the child on the basis of sex.

The argument of *amicus* that section 12 discriminates against the father because it deprives him from providing for his illegitimate child upon death unless he makes a will is without reason because the father is not a party to this case and any issue of a father being discriminated against because of his sex is not present.

The further argument of *amicus* that the right of a person to dispose of his or her property intestate is a fundamental right thus causing it to be measured by a strict standard of review is without merit because sex is not a "suspect" classification and *amicus* cites no case to support its theory.

No decision of this Court has definitively held that sex is a "suspect" classification, therefore a sex classification must be judged on whether it bears a rational relationship to a legitimate state purpose. In this case that purpose is to prevent false and spurious claims of paternity, and since there is a biological difference between mothers and fathers, it is a necessary distinction.

IV. The issue of the alleged denial of equal protection on the basis of sex has not been properly preserved for review by this Court because it was not raised in the trial court.

ARGUMENT

I.

ILLINOIS INHERITANCE LAWS WHICH PROHIBIT AN ILLEGITIMATE CHILD FROM INHERITING FROM HIS OR HER FATHER ARE REASONABLY AND RATIONALLY RELATED TO A LEGITIMATE STATE PURPOSE, ARE THEREFORE CONSTITUTIONAL AND DO NOT VIOLATE THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Introduction

The State of Illinois has adopted a statutory scheme to regulate the disposition of property within its borders that was owned by its citizens who die intestate. The statutory provision at issue in this case provides that an illegitimate child can only inherit from or through his or her mother and not from or through his or her father when the parent dies intestate. Ill.Rev.Stat. 1975, ch. 3, §12. Appellants contend that the foregoing provision violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution because the class of illegitimates is "suspect", and the application of strict judicial scrutiny to this classification demonstrates invidious discrimination. Appellee respectfully submits that the statutory provision in question has a rational relationship to a legitimate state purpose and therefore satisfies the test to determine the validity of a statute under the Equal Protection Clause and is thus constitutional.

A. The test for determining the validity of the statute is whether it bears a rational relationship to a legitimate state purpose

The rules for testing alleged discrimination under the Equal Protection Clause of the Fourteenth Amendment were summarized in *Morey v. Doud*, 354 U.S. 457, 1 L.Ed.2d 1485 (1957) as follows:

> "1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
>
> 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
>
> 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
>
> 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary." (354 U.S. at 463-64, 1 L.Ed.2d at 1490) (citation omitted)

In *Dandridge v. Williams*, 397 U.S. 471, 25 L.Ed.2d 491 (1970) this Court was called upon to decide the constitutionality of a Maryland statute which imposed a maximum limit on the total amount of aid which any one family unit could receive under the Federal Aid to Families With Dependent Children program. The District Court had decided that the statute was in

conflict with the federal statute and was also violative of the Equal Protection Clause of the Fourteenth Amendment. Mr. Justice Stewart, speaking for the majority, first decided that there was no statutory conflict and then addressing himself to the equal protection issue, stated:

> "In the area of economics and social welfare, a State does not violate the Equal Protection Clause merely because the classifications made by its laws are imperfect. If the classification has some 'reasonable basis,' it does not offend the Constitution simply because the classification 'is not made with mathematical nicety or because in practice it results in some inequality.' Lindsley v. Natural Carbonic Gas Co., 220 US 61, 78, 55 L Ed 369, 377, 31 S. Ct 337. 'The problems of government are practical ones and may justify, if they do not require, rough accommodations—illogical, it may be, and unscientific.' Metropolis Theatre Co. v. City of Chicago, 228 US 61, 69-70, 57 L Ed 730, 734, 33 S Ct 441. 'A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it.' McGowan v. Maryland, 366 US 420, 426, 6 L Ed 2d 393, 399, 81 S Ct 1101.
>
> To be sure, the cases cited, and many others enunciating this fundamental standard under the Equal Protection Clause, have in the main involved state regulation of business or industry. The administration of public welfare assistance, by contrast, involves the most basic economic needs of impoverished human beings. We recognize the dramatically real factual difference between the cited cases and this one, but we can find no basis for applying a different constitutional standard. See Snell v. Wyman, 281 F Supp 853, aff'd, 393 US 323, 21 L Ed 2d 511, 89 S Ct 553. It is a standard that has consistently been applied to state

legislation restricting the availability of employment opportunities. Goesaert v. Cleary, 335 US 464, 93 L Ed 163, 69 S Ct 198; Kotch v. Board of River Port Pilot Comm'rs, 330 US 552, 91 L Ed 1093, 67 S Ct 910. See also Flemming v. Nestor, 363 US 603, 4 L Ed 2d 1435, 80 S Ct 1367. And it is a standard that is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States their views of what constitutes wise economic or social policy.

Under this long-established meaning of the Equal Protection Clause, it is clear that the Maryland maximum grant regulation is constitutionally valid. We need not explore all the reasons that the State advances in justification of the regulation. It is enough that a solid foundation for the regulation can be found in the State's legitimate interest in encouraging employment and in avoiding discrimination between welfare families and the families of the working poor." (397 US at 485-486, 25 L Ed 2d at 501-02) (footnotes omitted)

In citing, among others, *Morey*, this Court, more recently in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 172, 31 L.Ed.2d 768, 777 (1972) stated:

> "The tests to determine the validity of state statutes under the Equal Protection Clause have been variously expressed, but this Court requires, at a minimum, that a statutory classification bear some rational relationship to a legitimate state purpose."

San Antonio School District v. Rodriguez, 411 U.S. 1, 36 L.Ed.2d 16 (1973) holds that in determining the validity of a state's statutory system for financing public education the proper standard for judicial review under the Equal Protection Clause of the Fourteenth

Amendment is whether or not that system bears some rational relationship to a legitimate state purpose.

Clearly then, the test to be applied to determine the constitutionality of the challenged provision of the Illinois Probate Act is whether the different treatment of illegitimate and legitimate children in relation to intestate succession from their fathers is rationally and reasonably related to a valid and legitimate state purpose. Appellants' argument that strict scrutiny must be utilized in testing the validity of the statute is not well taken. Indeed, appellants recognize that no case[1]

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[1] *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 31 L.Ed.2d 768 (1972) wherein the issue was whether the Louisiana workmen's compensation law discriminated against illegitimate children of the workmen; *Levy v. Louisiana*, 391 U.S. 68, 20 L.Ed.2d 436 (1968), where the issue was the validity of the Louisiana wrongful death statute which did not allow illegitimate children to recover for the wrongful death of their mother; *Glona v. American Guarantee & Liability Insurance Co.*, 391 U.S. 73, 20 L.Ed.2d 441 (1968) in which that portion of the Louisiana wrongful death statute which did not allow the mother of an illegitimate child to bring an action for the child's death was held invalid; *Jiminez v. Weinberger*, 417 U.S. 628, 41 L.Ed.2d 363 (1974) where the issue was the validity of that section of the Social Security Act that denied benefits to illegitimate children of a disabled father who became disabled before the children were born; *Labine v. Vincent*, 401 U.S. 532, 28 L.Ed.2d 288 (1971), a case almost identical to the one at bar where a Louisiana statute barring illegitimates from inheriting from their fathers was upheld; See also *Gomez v. Perez*, 409 U.S. 535, 35 L.Ed.2d 56 (1973); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd.* 409 U.S. 1069 (1972); *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd.* 409 U.S. 1069 (1972); *Beaty v. Weinberger*, 478 F.2d 300 (5th Cir., 1973), *aff'd.* 418 U.S. 901 (1974);

dealing with the rights of illegitimates has held that class to be "suspect" thus invoking the test of strict scrutiny rather than the rational or reasonable basis test.

B. The Illinois laws of descent are a valid exercise of the State's legitimate interest in regulating the disposition of the property of citizens who die intestate

The question for determination is whether the distinction between the treatment of legitimate and illegitimate children in inheriting from their fathers as provided by the Illinois Probate Act is reasonably and rationally related to a legitimate state purpose or does it constitute invidious discrimination thereby violating the Equal Protection Clause.

Appellee submits that since there is no "right to inherit" guaranteed, either explicitly or implicitly, by the Constitution of the United States, the State of Illinois has a legitimate and valid interest in regulating the disposition of property within its borders that was owned by its citizens who die intestate.

Illinois has exercised that interest by the adoption of its Probate Act (Ill.Rev.Stat. 1975, ch. 3) which gives citizens of Illinois almost complete freedom of testamentary disposition of their property. Section 42 of the Act provides that every person of the age of 18 years who is of sound mind and memory has the power to determine how his property will be devised and bequeathed at the time of his death by the execution of a will. Ill. Rev. Stat. 1975, ch. 3, §42. Residents of Illinois may also utilize other means to determine to

whom their property will pass at death, including *inter alia* joint tenancies, Ill. Rev. Stat. 1975, ch. 76, §§1 *et. seq.*, trusts, Ill. Rev. Stat. 1975, ch. 148, §101-120, and designation of beneficiaries in life insurance policies.

The Probate Act does impose certain restrictions on a testator's disposition of his property. A surviving spouse may renounce the will and take a statutory share of the estate, Ill.Rev.Stat. 1975, ch. 3, §§16, 16a and 17, and if children of the testator are born after the will is executed and the will does not either provide for after-born children or indicate an intent to disinherit them, these children are entitled to that share of the estate which they would have received if their parent had died intestate. Ill.Rev.Stat. 1975, ch. 3, §48. The Act also contains provisions for a surviving spouse's award, Ill.Rev.Stat. 1975, ch. 3, §178, and an allowance to child, Ill.Rev.Stat. 1975, ch. 3, §179, which are but means to afford temporary support to them during the nine month period following the decedent's death in a manner suited to the condition in life of the recipient and also suited to the condition of the estate.

Thus, apart from the restrictions noted above, a decedent in Illinois may divide his property as he sees fit, and children of a decedent, whether legitimate or illegitimate, have no right to receive either support from his estate or property or to receive any portion of that estate or property, and in effect, except for the child's award previously referred to, may be wholly disinherited. *Daly v. Daly*, 299 Ill. 268, 132 N.E. 495 (1921); *Butz v. Butz*, 13 Ill.App.3d 341, 299 N.E.2d 782 (1973).

The intermediate reviewing court in *In Re Estate of Karas*, 21 Ill.App.3d 564, 315 N.E.2d 603 (1974)

disposed of an argument based on the alleged rights of children to inherit from their parents in the following language:

> "The petitioner's strongest argument is that the statute unreasonably discriminates between legitimate and illegitimate children whose fathers die intestate, because the illegitimates may not inherit in this circumstance, unless they are acknowledged by their fathers and their parents intermarry. But the principal flaw in this argument is the *sine qua non* assumption that, under Illinois law, children somehow have a basic *right* to inherit from their parents. *There is no such right under Illinois law.* It is the parent's, not the child's right to elect how much and to whom (except for the spouse's statutory share) his property shall pass on his death, and the only real issue in such a case is what did the parent intend when he died leaving no will." (315 N.E.2d at 606)

The people of Illinois acting through their elected representatives, the General Assembly, have further provided in the same Probate Act for the distribution of any property of a decedent who dies without executing a will or otherwise disposing of his assets. Ill.Rev.Stat. 1975, ch. 3, §§11-18, 41. Section 11 (4)[2]

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[2]"§11. Rules of Descent and Distribution.)

The intestate real and personal estate of a resident decedent and the intestate real estate in this state of a non-resident decedent after all just claims against his estate are fully paid, descends and shall be distributed as follows:

* * *

(4) If there is no surviving spouse or descendant but a parent, brother, sister, or descendant of a brother or sister of the decedent; the entire estate to the parents, brothers and sisters of the decedent in equal parts, allowing to the surviving parent, if one is dead, a double portion and to the descendants of a deceased brother or sister per stirpes the portion which the deceased brother or sister would have taken if living."
(Ill.Rev.Stat. 1975, ch. 3, §11(4))

of the Act governs the factual situation in this case and provides that Sherman Gordon's parents, brothers and sisters equally share his entire estate because he died leaving no surviving spouse or descendants. As previously noted, section 12[3] of the Act precludes his illegitimate daughter, Deta Mona Trimble from inheriting from him.[4]

The effect of these statutory provisions, however harsh it might be on the child, bears both a reasonable

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[3]"§12. Illegitimates.

* * *

An illegitimate child is heir of his mother and of any maternal ancestor, and of any person from whom his mother might have inherited, if living; and the lawful issue of an illegitimate person shall represent such person and take, by descent, any estate which the parent would have taken, if living. A child who was illegitimate whose parents intermarry and who is acknowledged by the father as the father's child is legitimate."
(Ill.Rev.Stat. 1975, ch. 3, §12)

[4]It is clear that an illegitimate child had no common law right to inherit from either of his parents under the doctrine of *filius nulius*. In providing that an illegitimate is the heir of his mother, the Illinois General Assembly has created a statutory right in the illegitimate previously unknown to him. It is generally accepted that where the legislature creates a right by means of a statute, it may place any limitation it deems appropriate upon the exercise of that right or the remedy for its enforcement without violating the Equal Protection Clause of the Fourteenth Amendment. (See *Coy v. Folsom*, 228 F.2d 276 (3rd Cir., 1955) It is respectfully submitted that since the Illinois General Assembly has created a statutory right of an illegitimate to inherit from his mother, previously unknown to common law, the fact that the right is limited in that it does not provide for inheritance from the father does not offend equal protection under the Fourteenth Amendment.

and rational relationship to the legitimate state purpose of controlling the disposition of property owned by its citizens who die intestate. This proposition was most cogently stated by the Supreme Court of Minnesota in its opinion in the case of *In Re Estate of Pakarinen*, 287 Minn. 330, 178 N.W.2d 714 (1970), *appeal dismissed*, 402 U.S. 903, 28 L.Ed.2d 644 (1971):

> "Even though some better way might be devised to further mitigate the inhuman effect of the common-law rule, we are compelled to hold that the challenged provision of §525.172[5] is constitutional, for it cannot be said that the line it draws between the right of legitimates and illegitimates seeking to inherit from a father is irrational or bears no intelligible proper relationship to the purposes sought to be achieved by this and other sections of our Probate Code governing the descent of property upon death." (178 N.W.2d at 718) (footnote supplied)

The real purpose of the rules of descent and distribution is to provide a resident of Illinois with a method of disposing of his assets at death without the necessity of making a will or other similar arrangements. That the various states have an interest in

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[5]Section 525.172 provides:

> "An illegitimate child shall inherit from his mother the same as if born in lawful wedlock, and also from the person who in writing and before a competent attesting witness shall have declared himself to be his father, provided such writing or an authenticated copy thereof shall be produced in the proceeding in which it is asserted; but such child shall not inherit from the kindred of either parent by right of representation."

regulating the disposition of intestate property was recognized by this Court in *Labine v. Vincent*, 401 U.S. 532, 538, 28 L.Ed.2d 288, 294 (1971) thusly:

> "But the power to make rules to establish, protect, and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislature of that State."

The continuing vitality of *Labine* in this regard was indicated in the opinion in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 170 and n.8, 31 L.Ed.2d 768, 776 and n.8 (1972) wherein Mr. Justice Powell stated:

> "Respondents contend that our recent ruling in Labine v. Vincent, 401 US 532, 28 L Ed 2d 288, 91 S Ct 1017 (1971), controls this case. In Labine, the Court upheld, against constitutional objections, Louisiana intestacy laws which had barred an acknowledged illegitimate child from sharing equally with legitimate children in her father's estate. That decision reflected, in major part, the traditional deference to a State's prerogative to regulate the disposition at death of property within its borders. Id., at 538, 28 L Ed 2d at 293. The Court has long afforded broad scope to state discretion in this area.[8] Yet the substantial state interest in providing for 'the stability of . . . land titles and in the prompt and definitive determination of the valid ownership of property left by decedents,' Labine v. Vincent, 229 So 2d 449, 452 (La App 1969), is absent in the case at hand."

Footnote 8 referred to in the above cited portion of the Court's opinion in *Weber* states as follows:

"The Court over a century ago voiced strong support for state powers over inheritance: 'Now the law in question is nothing more than an exercise of the power which every state and sovereignty possesses, of regulating the manner and term upon which property real or personal within its dominion may be transmitted by last will and testament, or by inheritance; and of prescribing who shall and who shall not be capable of taking it.' Mager v. Grima, 8 How 490, 493, 12 L Ed 1168, 1170 (1850). See Lyeth v. Hoey, 305 US 188, 193, 83 S Ed 119, 123, 59 S Ct 155, 119 ALR 410 (1938)."

Thus the promulgation of laws of distribution and descent and of the particular statutory provision at issue here, that is, that an illegitimate child is only the heir of his or her mother and not his or her father, has been held by this Court to be a legitimate purpose of the state. These provisions embody the legislature's presumptions of the general intentions of Illinois residents in regard to disposition of their property, absent a will. The legislature has not attempted to differentiate, for example, between those in the same class of heirs. Children all share equally, regardless of whether they are minors or adults. Need is not a test, since wealthy adult children take two-thirds of their father's estate while a needy widow only inherits one-third. The State has not attempted to determine dependency; it has only attempted to determine to whom the decedent would probably want his property distributed, leaving him free to change that plan of distribution by the execution of a will, the creation of a joint tenancy or some other arrangement.

The Illinois Probate Act, therefore, has actually created a "statutory will" to be utilized by those

Illinois citizens who do not choose to dispose of their property upon their demise by some overt act during their lifetimes. In *In Re Estate of Pakarinen,* 287 Minn. 330, 178 N.W.2d 714 (1970), *appeal dismissed,* 402 U.S. 903, 28 L.Ed.2d 644 (1971) the court recognized the concept of a statutory will in the following language:

"The laws of descent are a legislative attempt to provide for the orderly distribution of property left by an intestate decedent.

'* * * It has been said that the passing of property upon intestacy is pursuant to a statutory will, which * * * is considered to be such a distribution as the intestate presumably would have made had he made a will. The general policy is to follow the lead of the natural affections and to consider as most worthy the claims of those who stand nearest to the affections of the intestate.'" (Citation omitted) (178 N.W.2d at 717)

Krupp v. Sackwitz, 30 Ill.App.2d 450, 174 N.E.2d 877 (1961) was a proceeding wherein the plaintiff, who was the acknowledged illegitimate daughter of the deceased, sought to have herself declared his heir. The trial court denied relief and the Appellate Court of Illinois affirmed. The issue was the validity of the statutory provision which was the predecessor of the statute involved in this litigation. The court commented:

"The plaintiff's father may have lived in the belief that the laws of descent were satisfactory and so he died intestate. The courts are now asked to change the law after his death and divert his estate in a manner differing from that which he is presumed to have known to be the law.

> The trial judges ruled in accordance with established law. Whether that law should, or could properly, be changed, is a question for the legislature, and this court declines to usurp that function. The judgment of the Circuit Court is affirmed."
> (174 N.E.2d at 879)

The power to make a will is in the testator and not in the court. If the testator fails to dispose of any part of his property, the laws of descent and distribution will operate to distribute that part of his property that the will failed to do. *Chicago Daily News Fresh Air Fund v. Kerner*, 305 Ill.App. 237, 239-240, 27 N.E.2d 310, 311 (1940).

Sherman Gordon failed to execute a will, therefore it must be presumed that he intended to leave his property according to the statutory scheme adopted by the Illinois General Assembly and disinherit his illegitimate daughter. *Hedlund v. Miner*, 395 Ill. 217, 228, 69 N.E.2d 862 (1946); *Belfield v. Findlay*, 389 Ill. 526, 60 N.E.2d 403, 406 (1945); and *Ickes v. Ickes*, 386 Ill. 19, 53 N.E.2d 585, 591 (1944).

Aside from its interest in seeing that the wishes of its residents in the distribution of their property at death be carried out, the State of Illinois has a substantial and legitimate interest in seeing that controversies over the property and estates of the decedents be speedily and finally determined and that spurious claims of paternity and heirship not be made.

The Illinois Probate Act specifically provides:

> "This Act and the rules now or hereafter adopted pursuant thereto shall be liberally construed to the end that controversies and the rights of the parties may be speedily and finally determined; . . ." (Ill.Rev.Stat. 1975, ch. 3, §9)

The Louisiana Court of Appeal in *Labine v. Vincent*, 229 So.2d 449, 452 (La.App. 1969) *aff'd*, 401 U.S. 532 (1970) postulated a similar state interest in commenting that one of the purposes of Louisiana in enacting its probate laws was to provide for, "the stability of . . . land titles and . . . the prompt determination of the valid ownership of property left by decedents." This language, it will be remembered, was quoted by this Court in *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164, 170, 31 L.Ed.2d 768, 776 (1972) and previously cited herein.

Illinois also has a legitimate interest in preventing false and spurious claims against the estates of decedents and to this end section 12 of the Probate Act bears a substantial relationship to that purpose. This interest was recognized by the Supreme Court of Illinois in *In Re Estate of Karas*, 61 Ill.2d 40, 329 N.E.2d 234 (1975) (Appendix 39-52) wherein the court noted:

> "We further recognize that the State maintains an interest in prohibiting spurious claims against an estate. The parties to these appeals tend to agree that proof of a lineal relationship is more readily ascertainable when dealing with maternal ancestors. It is suggested that proof of paternal relationship may not be so readily ascertainable but that such considerations should be decided individually on the facts of each case. While establishing paternity in a proceeding to determine heirship is possible, situations may arise which are fraught with fraudulent circumstances. There exists the possibility that an illegitimate "grandson" may seek to inherit from his "grandfather" who dies not only intestate but also after the death of his own son and without knowledge of the existence of the illegitimate. Similar circumstances might also arise

> in which illegitimates, claiming a collateral relationship, would seek rights to the estates of paternal intestate kindred. (See generally *Gregory v. County of LaSalle* (1968), 91 Ill.App.2d 290.) There also may be situations in which a "father's" testamentary disposition is challenged on behalf of an illegitimate child who was born after the will was executed, thereby possibly permitting the child to recover a share of the estate equivalent to that allowed if the "father" had died intestate. Ill.Rev.Stat. 1973, ch. 3, par. 48; 2 Homer, Probate Practice and Estates sec. 1331 (4th ed. 1960)" (329 N.E.2d at 240-41, Appendix 48-59)

The Illinois court was obviously enunciating one of the major problems sought to be remedied by prohibiting illegitimates from inheriting from and through their fathers. Imagine the dilemma of the "grandmother" in the hypothetical situation alluded to above where her husband has recently died, her son and only child long since having predeceased his father and the illegitimate child of her son now appears, claiming, pursuant to Illinois' law of descent (Ill.Rev. Stat. 1975, ch. 3, §11(1)[6]), two-thirds of the estate, that being the share his "father" would have inherited had he survived his father (the hypothetical "grandfather").

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[6]"§11. Rules of Descent and Distribution.)

The intestate real and personal estate of a resident decedent and the intestate real estate in this state of a non-resident decedent after all just claims against his estate are fully paid, descends and shall be distributed as follows:

(1) If there is a surviving spouse and also a descendant of the decedent: one-third of the entire estate to the surviving spouse and two-thirds to the decedent's descendants per stirpes."

This Court recognized the validity of the State's interest in preventing false claims in *Jiminez v. Weinberger*, 417 U.S. 628, 636, 41 L.Ed.2d 363, 370 (1974) where Chief Justice Burger stated:

> "We recognize that the prevention of spurious claims is a legitimate government interest . . ."
> (417) U.S. at 636, 41 L. Ed. 2d at 370)

The provisions of section 12 of the Illinois Probate Act are rationally related to the State's interest in preventing false claims. It is reasonable to differentiate between inheriting from one's mother as opposed to the father when one considers that the mother will always know that the child is hers while the father may never even know of the existence of the child. It is extremely difficult, if not impossible to make a false claim of maternity with any success, however it has been shown that claims of paternity frequently are erroneous. H. Krause, "Scientific Evidence and the Ascertainment of Paternity", 5 Family Law Q. 252, 254 at n.11 (1971) reports that a study of blood grouping tests in 1000 cases of disputed paternity indicated that 39.6% of the accused men were not actually the fathers of the children in question.

The impact of section 12 can be easily and readily avoided by the simple procedure of the father executing a will. In Sherman Gordon's case, since he had no surviving spouse who could have renounced his will pursuant to sections 16, 16a and 17 of the Probate Act *supra*, he could have left his entire estate to his illegitimate daughter. A simple one page will would have sufficed. *In Re Estate of Karas*, 21 Ill.App.3d 564, 315 N.E.2d 603 at 606 (1974).

Summary

The interest of the State of Illinois in the prompt and final determination of controversies over the property and estates of decedents, in seeing that such property and estates are distributed in accordance with the wishes of those decedents and the prevention of spurious and false claims against estates is a legitimate interest and bears a reasonable and rational relationship to the distinctions drawn in section 12 of the Probate Act. That section thus meets the test of constitutionality under the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States and should be upheld.

II.

LABINE V. VINCENT IS DISPOSITIVE OF THE ISSUE HERE AND SHOULD BE FOLLOWED AS CONTROLLING PRECEDENT

The precise issue presented by this case has been decided by this Court in *Labine v. Vincent*, 401 U.S. 532, 28 L.Ed.2d 288 (1971). Appellants urge that the Supreme Court of Illinois erroneously relied on *Labine* in deciding *In Re Estate of Karas*, 61 Ill.2d 40, 329 N.E.2d 234 (1975), and that that reliance was an unwarranted expansion of *Labine*. They further argue that *Labine* is "essentially limited to its facts" and that alternatively, *Labine* should be reconsidered in light of intervening decisions and overruled.

The decision in *Labine* upheld a Louisiana statutory scheme which precluded acknowledged illegitimate

children from inheriting equally with legitimate children where the father died intestate. Mr. Justice Black, speaking for five members of the Court stated:

> "These rules for intestate succession may or may not reflect the intent of particular parents. Many will think that it is unfortunate that the rules are so rigid. Others will think differently. But the choices reflected by the intestate succession statute are choices which it is within the power of the State to make. The Federal Constitution does not give this Court the power to overturn the State's choice under the guise of constitutional interpretation because the Justices of this Court believe that they can provide better rules. Of course, it may be said that the rules adopted by the Louisiana Legislature 'discriminate' against illegitimates. But the rules also discriminate against collateral relations, as opposed to ascendants, and against ascendants, as opposed to descendants. Other rules determining property rights based on family status also 'discriminate' in favor of wives and against 'concubines'."
> (401 U.S. at 537-538, 28 L.Ed.2d at 293) (footnotes omitted)

The Court concluded that the Equal Protection Clause did not empower the Court to "nullify the deliberate choices of the elected representatives of the people of Louisiana". (401 U.S. at 540, 28 L.Ed.2d at 294)

The Supreme Court of Illinois, in relying on *Labine* in *In Re Estate of Karas, supra*, was presented with the argument that several United States Supreme Court decisions (See Appendix, 45) "have severely lessened the vitality of Labine." In disposing of that argument, which is again presented here, the court stated:

"We have examined these decisions and do not find the constitutional impact of *Labine v. Vincent* to have been lessened. As previously set forth, *Weber v. Aetna Casualty & Surety Co.* explained *Labine v. Vincent,* and expressed no dissatisfaction with that decision."
(329) N.E.2d at 239, Appendix, 46)

We have previously quoted the citation in *Weber v. Aetna Casualty & Surety Co., supra,* which indicates this Court's continuing satisfaction with the *Labine* decision and *Labine's* present vitality.

The *Labine* decision has been followed by the courts. In *Watts v. Veneman,* 476 F.2d 529 (D.C. Cir. 1973), the illegitimate children of a deceased wage earner brought an action seeking Social Security benefits allegedly due them as a result of their father's death. One of the requirements necessary for the children to meet in order to receive benefits was the right to inherit under the intestacy laws of the wage earner's domicile. The District of Columbia, the domicile, had an intestacy law almost identical to the Illinois statute at issue here, providing that illegitimates may inherit from their mother and not their father. The children claimed the statutory scheme violated due process. The court denied the argument citing *Labine* and noting:

"The entire thrust of the Social Security laws relevant to dependents is to provide benefits to those who were most likely to have relied upon the deceased for their support. In light of this overriding purpose, it is well-established that Social Security benefits are not accrued property rights. One's ability to receive benefits is not dependent solely upon the biological relationship between the decedent and his children, but also upon the probability that the children were dependent for support upon the deceased.

Congress in enacting the Social Security laws made various judgments about the probability that children are dependent. For example, it seems more logical that illegitimates would be dependent upon their father if he has recognized them, or if in fact he is contributing to their support. The incorporation of a state's intestacy laws for purposes of determining eligibility is in furtherance of this scheme. If an illegitimate child may not inherit, then the child's support following the father's death is less likely to be dependent upon what was received upon the deceased's death than if the child could receive property following the wage earner's demise." (476 F.2d at 533) (footnotes omitted)

The court in *Watts* obviously adopted the reasoning in *Labine* that the state had a legitimate concern in promulgating laws of intestacy and it was for the legislature (in *Watts,* Congress) and not the court to exercise the power to make rules regulating the disposition of intestate property.

Labine was likewise followed and considered decisive of the issue in *In Re Estate of Hendrix,* 326 N.Y.S.2d 646 (1971). In that case the alleged illegitimate daughter of the famed "rock" music star, Jimi Hendrix, sought to be declared his sole heir. An adjudication of paternity had not been made prior to Hendrix' death as required by the pertinent New York Statute in order to allow the child to inherit from her father. The court in *Hendrix* denied the child's application and held that the statute did not amount to a denial of equal protection of the law to the illegitimate.

The Supreme Court of Illinois has once again recently cited *Labine* with approval. In *Cessna v. Montgomery,* ___Ill.2d___, 344 N.E.2d 447 (1976), the

court upheld the validity of the two-year statute of limitation for paternity suits in the face of a claim by the plaintiffs that the statute denied equal protection to an illegitimate child because his right of support from his father was conditioned on establishing paternity within two years (unless there is formal acknowledgement), while no conditions attached to the support rights of legitimate children. Plaintiffs relied on numerous cases, among them, *Levy*, *Glona*, *Weber*, *Gomez* and *Jiminez*. The court distinguished each and cited *Labine*, noting that it had been followed in *Karas*.

Thus it is apparent that this Court's decision in *Labine* has been repeatedly cited with approval and followed as precedent. It is dispositive of the issue in this case. The argument that to apply it to the factual situation now before the Court would be an unwarranted expansion of its holding is to miss the point that Justice Black's opinion applies with more force to this case than it did to the facts in *Labine*. Ezra Vincent, the decedent in *Labine* could only have left one-third of his property to his illegitimate daughter had he executed a will, 401 U.S. at 539, 28 L.Ed.2d at 294, while the decedent in this case, Sherman Gordon, could have left his entire estate to his illegitimate daughter by executing a will since he had no surviving spouse who could have renounced such a will. Ill.Rev.Stat. 1975, ch. 3, §§16, 16a and 17. Instead Gordon chose to disinherit his daughter by adopting the "statutory will" provided for in the Illinois Probate Act. This was his choice, he was free to make it and it should not be disturbed.

Moreover the doctrine of *stare decisis* would dictate that this Court now follow its decision in *Labine v. Vincent* which is only five years old. As former Justice

Goldberg has written in adopting the language in *Pollock v. Farmer's Loan & Trust Co.*, 157 U.S. 429, 652 (1895) (White, J., dissenting), *vacated on rehearing*, 158 U.S. 601 (1895):

> "The fundamental conception of a judicial body is that of one hedged about by precedents which are binding on the court without regard to the personality of its members. Break down this belief in judicial continuity, and let it be felt that on great constitutional questions this court is to depart from the settled conclusions of its predecessors, and to determine them all according to the mere opinion of those who temporarily fill its bench, and our Constitution will, in my judgment, be bereft of value and become a most dangerous instrument to the rights and liberties of the people."
> (Goldberg, "Equal Justice," 78 (1971)) (footnote omitted)

III.

SECTION 12 OF THE ILLINOIS PROBATE ACT DOES NOT DENY EQUAL PROTECTION OF THE LAWS ON THE BASIS OF SEX

The provisions of section 12 of the Illinois Probate Act that provide that an illegitimate child may inherit from his or her mother but not from his or her father make no distinction based on the sex of the child. As the Supreme Court of Illinois noted in *In Re Estate of Karas*, 61 Ill.2d 40, 329 N.E.2d 234 (1975):

> "No contention is asserted that section 12 of the Probate Act results in any sexual discrimination as between similarly situated males and

> females who seek inheritance from the estates of their fathers or other paternal kindred. Under section 12 no discrimination inures to an illegitimate as a result of the illegitimate's sex."
> (329 N.E.2d at 241) (Appendix, 50)

Thus section 12 clearly treats male and female illegitimate children on exactly the same basis and makes no differentiation between them as to inheritance rights. As the Appellate Court of Illinois stated in its decision in *Karas:*

> "Nor do we see any way in which the statute discriminates between illegitimates on the basis of sex, as if for instance the statute would only permit male illegitimates to inherit. Therefore this portion of her argument is not persuasive."
> (*In Re Estate of Karas,* 21 Ill.App.3d 564, 315 N.E.2d 603, 606)

Appellants argument that the child has been discriminated against on the basis of her sex is, therefore, totally devoid of merit.

Appellants and *amicus* both make the further argument that section 12 discriminates against the child's mother on account of her sex (we seriously question the right of both the mother and child to present such argument in this Court as will be seen *infra*) for the reason that the mother receives no assistance in her financial support of the child through an inheritance from the father, which inheritance is prohibited, while the child is allowed to inherit from the mother, thus easing the father's financial burden in supporting the child. *Amicus* extends the argument by postulating that the distinction in section 12 deprives a father from providing for his child upon his death unless he executes a valid will while no such act is

required of the mother who can provide for the child intestate. The argument of *amicus* in this last regard is without reason. The parties to this case do not include a complaining father, therefore the issue raised that a father has been deprived of the right to provide for his child intestate is not present in this case. *Amicus* cannot seriously object to the statute as it affects the mother's right to provide for an illegitimate without the necessity of a will, since the provision obviously eases the burden of a woman in that respect. *Amicus* further argues that the right of a person to dispose of his or her property intestate is a fundamental right thus causing it to be measured by a strict standard of review regardless of whether sex is a "suspect" classification, which it is not. No case is cited to support this last theory. In any event, the entire argument is without merit.

Turning now to the theory that the mother has been discriminated against on the basis of her sex, it must be noted at the outset that no decision of this Court has definitively held that sex is a "suspect" classification thus requiring that a classification by sex be subject to a strict judicial scrutiny. It is true that in *Frontiero v. Richardson,* 411 U.S. 677, 36 L.Ed.2d 583 (1973) four members of this Court speaking as a plurality held that statutory classifications based upon sex were inherently suspect and therefore subjected to close judicial scrutiny. In *Reed v. Reed,* 404 U.S. 71, 30 L.Ed.2d 225 (1971), this Court held invalid an Idaho statute which specifically gave preference to males over females in the appointment of administrators of estates. However, the decision in *Reed* is not based on any finding that sex is a "suspect" class and therefore subject to strict scrutiny, but is rather based on the fact

that a difference in the sex of competing applicants for letters of administration does not bear a rational relationship to a state objective. Likewise the decision in *Weinberger v. Wiesenfeld*, 420 U.S. 636, 43 L.Ed.2d 514 (1975) that men as well as women were entitled to survivors' benefits under the Social Security Act was not based on a finding that the sex classification was subject to strict scrutiny. *Stanley v. Illinois*, 405 U.S. 645, 31 L.Ed.2d 551 (1972) was not decided on a sex classification but rather on unequal treatment of parents.

Since a sex classification is not open to strict scrutiny it must be determined if the statutory distinction bears a rational relationship to a legitimate state purpose. Appellee submits that this inquiry must be answered in the affirmative.

The distinction between mothers and fathers in section 12 is grounded upon a reasonable biological basis. All women are necessarily present at the birth of their children while the father of an illegitimate may not even be aware of his or her existence. As noted by the Supreme Court of Minnesota in *In Re Estate of Pakarinen*, 287 Minn. 330, 178 N.W.2d 714 (1970):

> "While the identity of the mother of an illegitimate child is usually, if not always, easy to establish, even the mother is not always sure who the father is. Where a putative father denies paternity, no method of proof we are now aware of exists by which fatherhood can be conclusively established. Nothing–not a blood test, nor a judgment of paternity after trial, nor a voluntary plea of guilty to a charge of paternity in open court–proves with absolute certainty the paternity of the father."
> (178 N.W.2d at 718)

The fact that it is more difficult to determine the paternity than the maternity of an illegitimate child renders it constitutionally permissible to differentiate between the rights of illegitimates to inherit from their fathers as opposed to their mothers. It is a necessary distinction based upon the difficulties of proof and bears a rational relationship to the legitimate state purposes of regulating disposition of intestate property and fostering the orderly administration of estates by preventing false and spurious claims of paternity. That it tends to discriminate against women does not deprive them of equal protection of the law because as this Court said in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 55 L.Ed. 369, 377 (1910):

> "A classification having some reasonable basis does not offend against [the Equal Protection Clause of the Fourteenth Amendment] merely because it is not made with mathematical nicety or because in practice it results in some inequality."

IV.

THE ISSUE OF THE ALLEGED DENIAL OF EQUAL PROTECTION ON THE BASIS OF SEX HAS NOT BEEN PROPERLY PRESERVED FOR REVIEW BY THIS COURT

A serious question exists as to whether the issue of unconstitutional discrimination on the basis of sex is properly before this Court and although Appellee has chosen to meet that argument we feel compelled to call the Court's attention to the fact that the issue may not have been preserved for review.

The only pleading filed by Appellants in this cause was filed in the trial court and was entitled, "Petition for Letters of Administration, Determination of Heirship, Declaratory and Injunctive Relief (Including Paternity Order)" (Appendix, 3-6 wherein the pleading is reproduced in full). The introductory paragraph of that petition which appears directly before paragraph number one (1) states:

> "JESSIE TRIMBLE for and on behalf of her minor child DETA MONA TRIMBLE, on oath states:"
> (Appendix, 3)

The pertinent paragraph of the petition that first raises a constitutional question and is the only pleading found anywhere in the record that alleges that section 12 of the Illinois Probate Act violates the illegitimate's right to equal protection of the laws under the Fourteenth Amendment states as follows:

> "11. For the State to provide by common law, statute or interpretation of statute that a legitimate child is the heir of its father, but an illegitimate is not the heir of its father, violates and contravenes the illegitimate child's rights to due process and equal protection of the laws as guaranteed by Article I, Section 2 of the Constitution of the State of Illinois, and the Fourteenth Amendment to the Constitution of the United States." (Appendix, 4-5)

Nowhere does the petition allege that the constitutional rights of the mother, Jessie Trimble have been violated on account of her sex or any other reason. Nowhere does the petition pray for any substantive relief for and on behalf of Jessie Trimble. Nowhere does the petition allege that the child has been

discriminated against because of her sex. As a matter of fact a careful examination of the wording of the allegations in paragraph 11 of the petition leads to the conclusion that sex discrimination against either the child or the mother was not in the mind of the pleader nor can it be inferred because the basis for the alleged unconstitutionality was that a legitimate child was the heir of his father while an illegitimate was not. Nowhere is it alleged that the denial of equal protection is caused by the fact that the illegitimate can inherit from his or her father rather than his or her mother. Moreover, this pleading was brought by the mother in a representative capacity only, as evidenced by the introductory paragraph quoted above. She was not a real party in interest to the litigation except for the fact that she asked to be appointed administrator of the estate, but even that request was, "as mother and next friend" of the child. (See Appendix, 5, paragraph number 3)

It has been held that this Court is not compelled to decide issues not raised in the lower court, *California v. Taylor*, 353 U.S. 553, 557 n.2, 1 L.Ed.2d 1034 (1957); *Lawn v. United States*, 355 U.S. 339, 362 n.16, 2 L.Ed.2d 321 (1958); *De Backer v. Brainard*, 396 U.S. 28, 32, 24 L.Ed.2d 148, 153 (1969); *Moore v. Illinois*, 408 U.S. 786, 799, 33 L.Ed.2d 706, 716 (1972), but as pointed out in *Youakim v. Miller*, ___U.S.___, 47 L.Ed.2d 701, 705 (1976) (citing other cases) the rule is not inflexible and can give way under exceptional circumstances.

Appellees contend that the issue of the alleged denial of equal protection based on sex was not preserved for review by this Court because it was not presented at the trial court level. The issue has,

however, been briefed by all parties and we will respectfully and naturally adhere to the Court's discretion in this regard.

CONCLUSION

Section 12 of the Illinois Probate Act which prohibits illegitimate children from inheriting from or through their fathers bears a rational relationship to a legitimate state purpose and therefore is not violative of the Equal Protection Clause of the Fourteenth Amendment to the Constitution of the United States. Appellee, Ethel Mae King respectfully requests that this Court affirm the judgment of the Supreme Court of Illinois.

Respectfully submitted,

/s/Miles N. Beermann
MILES N. BEERMAN

One of the Attorneys for Appellee,
Ethel Mae King

MILES N. BEERMAN
221 North LaSalle Street
Chicago, Illinois 60601
(312) 726-8995

FRED KLINSKY
188 West Randolph Street
Suite 1227
Chicago, Illinois 60601
(312) 346-2280

Attorneys for Appellee,
Ethel Mae King

PROOF OF SERVICE

MILES N. BEERMANN, certifies that he has served a copy of the Brief of Appellee, Ethel Mae King, on:

Devereux Bowly and Charles Linn
Legal Assistance Foundation of Chicago
911 South Kedzie Avenue
Chicago, Illinois 60612

James Weill and Jane G. Stevens
Legal Assistance Foundation of Chicago
343 South Dearborn Street
Chicago, Illinois 60604

Eric M. Lieberman
30 East 42nd Street
New York, New York 10016

Norman Dorsen
40 Washington Square So.
New York, New York 10012

Melvin Wulf and Joel M. Gora
American Civil Liberties Union Foundation
22 East 40th Street
New York, New York 10016

Mr. William Gordon
5672 West Fulton Street
Chicago, Illinois 60644

Mr. Joseph Roosevelt Gordon
General Delivery
Meridian, Mississippi 39301

Mrs. Hellie Mae Gordey
General Delivery
Meridian, Mississippi 39301

Ms. Mary Lois Gordon
General Delivery
Lawdale, Mississippi

by depositing a copy of same in a mail box with first class postage prepaid to the Chicago addresses, and air mail postage prepaid to the New York and Mississippi addresses this 2nd day of July, 1976.

/s/Miles N. Beermann
MILES N. BEERMANN

Miles N. Beermann
One of the Attorneys for
Appellee, Ethel Mae King
221 North LaSalle Street
Chicago, Illinois 60601
(312) 726-8995

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

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DETA MONA TRIMBLE AND
JESSIE TRIMBLE,

Appellants,

v.

JOSEPH ROOSEVELT GORDON, *et al.*,

Appellees.

APPEAL FROM THE SUPREME COURT OF ILLINOIS

REPLY BRIEF OF THE APPELLANTS

DEVEREUX BOWLY
CHARLES LINN
Legal Assistance Foundation
of Chicago
911 South Kedzie Avenue
Chicago, Illinois 60612
(312) 638-2343

JAMES D. WEILL
JANE G. STEVENS
Legal Assistance Foundation
of Chicago
343 South Dearborn Street
Chicago, Illinois 60604
(312) 341-1070

Attorneys for Appellants

Washington, D.C. • CLB PUBLISHERS' • LAW PRINTING CO. • (202) 393-0625

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APPEAL FROM THE SUPREME COURT OF ILLINOIS

REPLY BRIEF OF THE APPELLANTS

ARGUMENT

I.

THE DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN BASED SOLELY ON THEIR ILLEGITIMACY SHOULD BE SUBJECTED TO THE SAME RIGOROUS EQUAL PROTECTION SCRUTINY THAT THIS COURT HAS APPLIED PREVIOUSLY TO CLASSIFICATIONS AGAINST ILLEGITIMATE CHILDREN.

The invidious discrimination established by Section 12 of the Illinois Probate Act,[1] barring illegitimate children from inheriting from their intestate fathers, bears no rational or fair and substantial relationship to any legitimate state interest, as will be shown in Section II, *infra*. Appellants have also argued, however, that the statute should be subjected to a level of scrutiny higher than that imposed by the "traditional" or "rational basis" equal protection test. Illegitimate children share certain attributes with other traditionally disadvantaged groups, discrimination against whom has been closely scrutinized (Appellants' Brief, pp. 14-21). In a series of cases the Court has noted this and has closely scrutinized discrimination against illegitimate children. (Appellants Brief, pp. 21-30).

In response, Appellee's Brief correctly states (pp. 9-10) that this Court had not held that a classification against illegitimate children is "suspect."[2] At this point, however, Appellee goes astray by implying that the statute may be effectively insulated from any equal protection scrutiny. This implication comes in several forms. First, Appellee emphasizes that there is no "right to inherit." (Appellee's Brief, pp. 10, 12) No argument has been made that there is a constitutional right to inherit. Nevertheless, the legislature, in creating any statutory right, must not invidiously discriminate without rational basis. The absence of a "right to inherit" does not suspend equal protection inquiry.

Second, Appellee argues that the crucial purpose of the Illinois intestate succession law is to provide a

[1] What was formerly Section 12 of the Probate Act, Ill. Rev. Stat. ch. 3, §12, effective at the time of Sherman Gordon's death, has been recodified in 1976 as Ill. Rev. Stat. ch. 3, §2-2. Public Act 79-328. No substantive change or change in wording has been made in the recodification.

[2] Appellee also submits extensive citation from such cases as *Morey v. Doud*, 354 U.S. 457 (1957), and *Dandridge v. Williams*, 397 U.S. 471 (1970) (Appellee's Brief, pp. 6-8), which merely define in the abstract the "traditional" equal protection test, a rational relationship to a legitimate state purpose.

method of disposition of property at death without a will. (Appellee's Brief, pp. 10, 14). While the statement is true so far as it goes, it conveys no real meaning; in effect it says that the purpose of the statute is to exercise a state power. That, however, is the function of any state statute; as will be seen, it does not define the type of inquiry that must be made into the rationale for invidious discrimination. Third, Appellee cites *Labine v. Vincent*, 401 U.S. 532 (1971), to the effect that the power to make discriminatory intestate succession laws is somehow uniquely and absolutely committed to the state.[3]

What these suggestions by Appellee have in common is an assumption that when a state exercises a traditional state function, in an area that does not involve basic Constitutional rights, the statutory discrimination is virtually insulated from Equal Protection review. This is simply incorrect. The traditional state function, like any state action, must be exercised in a manner free from invidious discrimination, and free from discrimination unrelated to legitimate state purposes. Moreover, as the statute tends to affect fundamental rights or to impose invidious discrimination against a traditionally disadvantaged and politically powerless group, closer scrutiny becomes appropriate. Thus, one noteworthy factor in this Court's prior holdings invalidating discrimination against illegitimate children is the consistent presence of statutory schemes in which the legislature is normally given substantial latitude: *Levy v. Louisiana*, 391 U.S. 68 (1968), and *Glona v. American Guarantee and Liability Insurance Co.*, 391 U.S. 73 (1968), concerned a Louisiana statutory wrongful death scheme; *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. 164 (1972), involved state-created workmen's compensation benefits; *Gomez v. Perez*, 409 U.S. 535 (1973), considered the state's imposition of paternal obligation to

[3] This dictum in *Labine* has been particularly criticized. Section IV-B, *infra*; dissent in *Labine*, 401 U.S. at 548-549. See also *Reed v. Reed*, 404 U.S. 71 (1971).

support; *New Jersey Welfare Rights Org. v. Cahill*, 411 U.S. 619 (1973), concerned a state-funded General Assistance program; *Stanley v. Illinois*, 405 U.S. 645 (1972), involved state child custody laws.[4] These are traditional state functions, comparable to intestacy laws; this factor, however, did not insulate the statutes from normal Equal Protection analysis. Rather, there was a heightened scrutiny because of the nature of the group against whom the discrimination was occurring–illegitimate children. Similarly, in *Reed v. Reed*, 404 U.S. 71 (1971), the intestacy statute was carefully scrutinized because of the character of the disadvantaged group–women.

This Court's most recent decision in this area, *Mathews v. Lucas*, ____ U.S. ____, 96 S.Ct. 2755 (1976), reasserts the principles of such scrutiny of broad exclusionary classifications against illegitimate children. While *Lucas* rejects the argument that classifications based on legitimacy are inherently suspect, and therefore subject to "strict scrutiny," it also emphasizes that the standard of review applied is "not a toothless one" and describes the case as being "in this realm of less than strictest scrutiny." 96 S.Ct. at 2764. In defining a standard, the *Lucas* statements of the status of illegitimacy and the nature of the inquiry into the discrimination are drawn from and reaffirm *Weber v. Aetna Casualty & Surety Company*, 406 U.S. 164 (1972); *Gomez v. Perez*, 409 U.S. 535 (1973); and *Jimenez v. Weinberger*, 417 U.S. 628 (1974), all of which subjected classifications based on illegitimacy to rigorous scrutiny, and found them offensive to the

[4] Similarly, the Social Security illegitimacy cases, *Mathews v. Lucas* 96 S.Ct. 2755 (1976); *Jimenez v. Weinberger*, 417 U.S. 628 (1974); *Beaty v. Weinberger*, 478 F.2d 300 (5th Cir. 1973), *aff'd*, 418 U.S. 901 (1974); *Griffin v. Richardson*, 346 F. Supp. 1226 (D. Md. 1972), *aff'd* 409 U.S. 1069 (1972); *Davis v. Richardson*, 342 F. Supp. 588 (D. Conn. 1972), *aff'd* 409 U.S. 1069 (1972), concerned a governmental function in which the legislature is traditionally given broad latitude. Compare *Weinberger v. Salfi*, 422 U.S. 749 (1975).

Equal Protection Clause. (See Appellants' Brief, pp. 20-30.)

Lucas thereby confirmed that an exacting standard of review is to be applied to broad exclusions of illegitimate children. Crucial to the actual holding was the Court's observation that (unlike most of the other illegitimacy cases previously considered, from *Levy v. Louisiana*, 391 U.S. 68 (1968), through *Jimenez, supra*[5]), *Lucas* involved a classification which broadly favored entitlement, providing benefits to any child whose paternity was adjudicated *or* who was acknowledged *or* who could prove other minimal attributes of dependency. The *Lucas* provisions thus extended benefits to almost all sub-classes of illegitimate children, excluding only a small group who could meet none of the several alternative criteria for entitlement. *Lucas* carefully distinguished the scheme of favorable presumptions, based on "reasonable empirical judgments that are consistent with a design to qualify entitlement" upon the presentation of relevant evidence, from prior cases where "not only was the legitimate child automatically entitled to benefits but an illegitimate child was denied benefits solely and finally on the basis of illegitimacy. . . ." 96 S.Ct. at 2765.

Even this relatively benign statutory scheme was carefully analyzed, and was upheld only because, in contrast with other statutes discriminating against illegitimate children,

> the statute does not broadly discriminate between legitimates and illegitimates without more, but is carefully tuned to alternative considerations.

Lucas, 96 S.Ct. at 2766.

[5] The sole partial exception is *Labine v. Vincent*, 401 U.S. 532 (1971), in which some illegitimate children were precluded from intestate succession from their fathers. But these same children were granted support rights from their fathers' estates. The fact that the statute did not deny all entitlement may explain, to some extent, the Court's decision upholding the statute. See Appellants' Brief, pp. 29-30, 50-52; Section IV-A, *infra*.

Lucas, then, is consistent with this Court's prior decisions carefully reviewing statutory schemes which totally exclude illegitimate children from protection or benefits accorded other children. The Court reaffirmed the principles previously stated that ". . . the legal status of illegitimacy, however defined, is like race or national origin, a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society," and that imposing disabilities on innocent children simply because of their birth status remains "illogical and unjust." *Lucas*, 96 S.Ct. at 2762. Certainly the standard enunciated and applied in *Lucas* is a rigorous one, and the Court's explanation of its refusal to apply strict scrutiny *per se* does not negate the propriety of rigorous review of much broader and harsher statutory classifications, such as the one present in this case. Thus the broad exclusionary classification embodied in §12 of the Illinois Probate Act must be subjected to the scrutiny articulated and utilized in the cases from *Weber* through *Lucas*. By any standard of review, however, the instant classification is irrational and unconstitutional, as will be shown in the next section.

II.

THERE IS NO RATIONAL BASIS FOR THE INVIDIOUS DISCRIMINATION AGAINST ILLEGITIMATE CHILDREN.

Appellee essentially offers three alleged justifications for the challenged classification: that the statute is in accord with the presumed intent of decedents; that there was no insurmountable barrier to Sherman Gordon writing a will; and that the state has a legitimate interest in preventing spurious claims and in the prompt devolution of intestate property. None of these elements can justify the total exclusion of illegitimate children embodied in Section 12 of the Illinois Probate Act.

A. The discrimination against illegitimate children is not rationally related to the alleged presumed intent of decedents.

Appellee argues that Illinois has a legitimate interest in satisfying the "presumed intent" of decedents who die intestate and that the state furthers that interest by excluding all illegitimate children from intestate succession from their fathers. (Brief for Appellee, pp. 16-18.) This rationale is fallacious for several reasons.

First, the entire theory rests on labelling as private action what is really state action; but a distinction between the two lies at the very heart of the Equal Protection Clause. Intestate succession laws are *not* wills drawn by individuals; they are legislative commands, which declare state policy, and as such are subject to the dictates of the Equal Protection Clause. While a private citizen in Illinois may generally pass property in a will in any way he sees fit, the state is prohibited from itself making such discriminatory choices. *Cf. Evans v. Newton*, 382 U.S. 296 (1966); *Pennsylvania v. Board of Directors of City Trusts*, 353 U.S. 230 (1957); *Reed v. Reed*, 404 U.S. 71 (1971). Even if it were true that some men might want to disinherit their illegitimate children, that can hardly serve to justify such discrimination by the state itself. As stated by the

Seventh Circuit, invalidating an intestate discrimination against illegitimate children:

> In our judgment, the presumed intent of intestate decedents is an unacceptable justification for a decision by the state which the state would otherwise be unable to justify. * * * Just as private schools or private hospitals may place some arbitrary limits on the classes of people they will serve, so may testators make irrational choices in the distribution of their property. But when the choice is made by the government, the obligation to afford all persons equal protection of the laws arises. *Eskra v. Morton*, 524 F.2d 9, 14 (7th Cir. 1975).[6]

Similarly, in *Pendleton v. Pendleton*, 531 S.W.2d 507, 510 (1975), *appeal docketed*, 44 U.S.L.W. 3711 (May 4, 1976) (No. 75-1610), the Kentucky Court of Appeals, objecting to the result mandated by *Labine v. Vincent, supra*, said:

> We find no justification in logic for [the state's] authority to deny illegitimate children the same right of inheritance *conferred upon* other children. (Emphasis added.)

In short, it is the state action that is actively denying the illegitimate child inheritance rights, and is substituting a patrimony of stigma.

The suggested dichotomy between normal state action and, in intestate succession, neutral alignment of the state's intestacy disposition with presumed private intent, is in addition misleadingly facile. The entire field

[6]The full quotation from *Eskra* appears in Appellants' Brief, at pp. 47-48. See also *McLaurin v. Oklahoma State Regents*, 339 U.S. 637, 641 (1950), invalidating segregated facilities in a graduate school:

> "There is a vast difference - a Constitutional difference - between restrictions imposed by the state[and individual social action]. The removal of the state restrictions will not necessarily abate individual and group predilections, prejudices and choices. But at the very least, the state will not be depriving appellant . . . ."

is replete with state activity granting or restraining testamentary capacity, and encouraging or mandating discrimination against illegitimate children. For example, a substantial portion of the population, under Illinois law, lacks testamentary capacity because they are minors or not of sound mind or body, Ill. Rev. Stat. ch. 3, §42; the wills of others fail. In these circumstances the State's intestacy disposition alone controls, as it also governs the disposition of assets not devised by an existing will, Ill. Rev. Stat. ch. 3, §51, and the forced share of children born after the will is made, Ill. Rev. Stat. ch. 3, §48.[7] In such instances, there is no testamentary ability to override the state action which discriminates against illegitimate children.

Analogously, Illinois uses a variety of methods to promote discrimination and discourage or prohibit fathers from leaving part or all of their assets to illegitimate children. For example, there is a higher inheritance tax rate on bequests to illegitimate children who are acknowledged for less than 10 years, like Deta Mona Trimble, in comparison to the preferential tax rate on transfers to spouse, parents, children,[8] and "persons to whom the decedent, for not less than ten years prior to death, stood in the acknowledged relation of a parent." Ill. Rev. Stat. ch. 120, §375.[9] Other

[7]Ill. Rev. Stat. ch. 3, §42 is recodified as ch. 3, §4-1; ch. 3, §51 is now ch. 3, §4-14; ch. 2, §48 is now ch. 3, §4-10. See note 1, *supra*.

[8]"Child" does not include illegitimate children. *Murphy v. People*, 213 Ill. 154, 72 N.E. 779 (1904); *Hardesty v. Mitchell*, 302 Ill. 369, 134 N.E. 745 (1922).

[9]The differential exemptions and rates embodied in the statute would cause the following tax burdens on testate transfers received by various relatives: on a $3,000 transfer $0 tax on spouse, legitimate children, parents, etc., and $290 tax on illegitimate child acknowledged for less than 10 years; on a $20,000 transfer, $0 tax and $1,990 tax, respectively; on a $100,000 transfer, $2,200 tax and $13,594 tax, respectively. Similar provisions exist in other states. In Pennsylvania the tax

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states use a variety of analogous devices to inhibit the testamentary capacity of the father of an illegitimate child. H. Krause, *Illegitimacy, Law and Social Policy* 41-42 (1971).

In short, as stated in *Irving Trust Co. v. Day*, 314 U.S. 556, 562 (1941); "Rights of succession to the property of a deceased, whether by will or by intestacy, are of statutory creation, and the dead hand rules succession only by sufferance." In Illinois, a pattern of such state action is being used to crystallize and perpetuate invidious discrimination. This case presents two groups of children identically situated, except that one group—the illegitimate children—have historically been subject to legal disabilities and social opprobrium due to no fault of their own. To say that a statute is justified because it sanctions the desire of some persons to perpetuate such disabilities and stigma would hide any invidiously discriminatory state action under a smokescreen of self-fulfilling prophecy.[10] But, "if the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare [legislative] desire to harm a politically unpopular group cannot constitute a *legitimate* govern-

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(footnote continued from proceeding page)

rate on testate transfers received by legitimate children and certain other relatives is 6%, but on bequests to illegitimate children is 15%. Pennsylvania Taxation and Fiscal Affairs Code, 72 P.S.§§2485- 102(a), 2485-403, 2485-404. In Illinois, additional bars to transfers at death are entwined with the discriminatory pattern. Some public employee death benefits of fathers are not available to illegitimate children. E.g., Ill. Rev. Stat. ch. 108-1/2, §§8-158, 11-153 (municipal employees, officials, and laborers, in cities over 500,000 population).

[10] As stated in *Miller v. Laird*, 349 F. Supp. 1034, 1044 (D.D.C. 1972) (three-judge court), invalidating an exclusion of illegitimate children from a medical care benefits scheme for servicemen's children:

> "This notion of a general lack of parental concern for the welfare of illegitmate children is nothing more than sheer speculation. *** Such a premise is entirely too precarious to comprise a rational supporting basis. . . ."

mental interest." *U.S. Dept. of Agriculture v. Moreno*, 413 U.S. 528, 534 (1973).

Second, the statute at issue here does *not* reflect the intent of the people of Illinois, 95% of whom believe that the illegitimate child should not be completely excluded in intestacy. Krause, *Illegitimacy, Law and Social Policy* 167 (1971). This opinion was generally held regardless of the sex, race, income, education, occupational level, political party identification, marital status or age of the respondents. Krause, *supra* at 162, 167.

That "presumed intent" was not and cannot be a basis for the exclusion of illegitimate children is also the apparent view of the Illinois Supreme Court. While decedent intent may be a legislative consideration underlying other provisions of the intestacy statute, there is no evidence that the State of Illinois believes it is in accord with decedents' intentions in disinheriting illegitimate children.[11] What evidence there is leads to the opposite conclusion. The decision in *In re Estate of Karas*, 61 Ill.2d 40, 329 N.E.2d 234 (1975) (A 38-52) fails to mention "presumed intent," focusing only on alleged purposes of promoting family relations (A 44-45) and preventing spurious claims (A 48-49). This failure is less surprising when it is realized that nothing in the Probate Act or its history reveals such a purpose. In fact, the only purpose for these provisions consistently found by the Illinois courts is that of mitigating the harshness of the common law doctrine that the

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[11] *Krupp v. Sackwitz*, 30 Ill. App. 2d 450, 174 N.E.2d 877 (1st Dist. 1961), cited by Appellee at pp. 17-18 of her Brief, does not intimate to the contrary. *Krupp* simply states, erroneously (see Section II-B, *infra*), that intestate succession is equivalent to intended testamentary disposition because the decedent is presumed to know the law and to have adopted its provisions.

illegitimate child was *filius nullius*, by allowing children to inherit from their mothers.[12]

In other words, rather than reflecting the presumed intent of Illinois decedents, the statute merely reflects archaic stereotypes and a medieval system of punishing innocent illegitimate children for the perceived sins of their parents. The "presumed intent" argument is founded upon the generalized notion that male decedents will not want illegitimate children to inherit. In recent years this Court has repeatedly found such overbroad, absolute exclusions to be constitutionally offensive when they are based: a) on archaic notions of the status of illegitimate children, *e.g., Jimenez v. Weinberger, supra; Weber v. Aetna Casualty & Surety Co., supra; Gomez v. Perez, supra*; b) on archaic sexual stereotypes, *Stanton v. Stanton*, 421 U.S. 7 (1975); *Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Reed v. Reed*, 404 U.S. 71 (1971); and c) on a mix of sex and illegitimacy stereotypes, assuming no relation between illegitimate child and father, *Stanley v. Illinois*, 405 U.S. 645 (1972).[13]

Here the stereotypes underlying the statute are of illegitimate children undeserving of paternal interest and

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[12] Recognizing this, the court in *Karas* quoted a long passage from its decision in *Smith v. Garber*, 286 Ill. 67, 70, 121 N.E. 173 (1918), interpreting the predecessor of §12 of the Probate Act, in which the Court found that these sections "were enacted for the purpose of obviating the undue severity of the common law and of erecting a rule more consonant with justice to an innocent and unfortunate class . . ." *Karas*, at A 41-42.

[13] Ironically, if Peter Stanley were to die today intestate, after fighting for the right to custody of his children all the way to this Court, Illinois would "presume" that his interest in the children was so minimal that he would prefer his property to escheat to the state rather than be given to the children. Moreover, inconsistently with the "presumed intent' alleged to underlie this statute, the custody rights of fathers of illegitimate children have been expanded, since *Stanley*, in Illinois and other states, so that they now are equal to those of mothers. See *Irby v. Dubois* __ Ill. App.3d __, 354 N.E. 2d 562 (1st Dist. 1976), and cases cited therein.

of irresponsible men who have no interest in the children or their welfare. Sociological research, however, indicates that fathers of illegitimate children often have long relationships with the mother, and demonstrate concern for both mother and child.[14] A significant proportion of the children actually live with their fathers rather than their mothers,[15] and a far greater percentage of children live with both parents, as did Deta Mona Trimble,[16] or have fathers who demonstrate concern. Twenty-nine states have recognized the invalidity of the outdated stereotypes and presumed a paternal intent that illegitimate children, who meet established criteria of proof, should inherit. (See Appendix to Appellants' Brief.)

In instances in which the paternity of the child has been established, the intent of the decedent cannot be based on pure legislative speculation about the subjective motives of fathers, where such speculation establishes a bar to all illegitimate children. Rather, the

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[14] See Herzog, "Some Notes About Unmarried Fathers," 45 *Child Welfare* 194 (April 1966); Wessel, "A Physician Looks at Services for Unmarried Parents," 49 *Social Casework* 11 (1968); Chaskel, "Changing Patterns of Services for Unmarried Parents," 49 *Social Casework* 3 (1968); Sauber and Rubenstein, *Experiences of the Unwed Mother as a Parent* (1965); Pannor, Massarik & Evans, *The Unmarried Father* (1971); H. Pope, "Unmarried Mothers and Their Sex Partners," *Journal of Marriage and the Family* 555 (August, 1967).

[15] U.S. Bureau of the Census, *U.S. Census of the Population 1960 - Vol. 1, Characteristics of the Population, Part 1 U.S. Summary*, U.S. Government Printing Office, Washington, D.C. 1964, Table 185; U.S. Bureau of the Census, *U.S. Census of the Population 1970 - Vol. 1, Characteristics of the Population, Part 1 U.S. Summary - Section 2*, U.S. Government Printing Office, Washington, D.C. 1973, Table 206.

[16] "[The] illegitimate child may suffer as much from the loss of a parent as a child born within wedlock .... So far as this record shows the dependence and natural affinity of the unacknowledged illegitimate children for their father were as great as those of the four legitimate children ...." *Weber v. Aetna Casualty & Surety Co.*, 406 U.S. at 169 (1972).

intent of the father in regard to his surviving illegitimate child must be measured by correlative objective evidence of the father's relationship, *e.g.*, a paternity adjudication or acknowledgement. Decisions from *Weber v. Aetna Casualty & Surety Co., supra*, through *Mathews v. Lucas, supra*, have established that the status of birth alone cannot stand as an accurate index of whatever the state is trying to measure, including the intimacy of the relationship. Thus, using objective criteria, the overexclusion of illegitimate children based on unsupported legislative assumption of invidious private intent, and the overexclusion based on illusory or overgeneralized proof problems (see Section II-C, *infra*) are equivalent; these overexclusions, both of which ignore the objective evidence of paternal relationship, are then equally invalid. See *Mathews v. Lucas*, 96 S.Ct. at 2765, upholding a narrow exclusion of illegitimate children only because it was based on "reasonable empirical judgments that are consistent with a design to qualify entitlement" of the child when there is objective evidence of the father-child relationship before death.[17]

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[17] Similarly, *Mathews v. Lucas* noted, 96 S.Ct. at 2766-2767, that intestacy law as a residual criterion of proff may coincide with perceived parental obligation to the illegitimate child in other circumstances, concluding that where intestacy law does not protect the child, there is a nexus to a presumption of lack of likelihood of actual support (in the absence of actual evidence showing support). The converse is equally true: where there is objective evidence of support or of other adjudicated or assumed parental obligation, it is necessary to presume an intended fulfillment of parental relationship and obligation in the intestacy statute. Illinois ignores the logic of this nexus.

B. The discrimination against illegitimate children is not rationally related to any State interest which is based on the fact that there was no insurmountable barrier to Sherman Gordon writing a will.

The Appellee further argues (Appellee's Brief, p. 26) that the decedent Sherman Gordon specifically "chose to disinherit his daughter by adopting the 'statutory will' provided for in the Illinois Probate Act. This was his choice. . . ." This is akin to the argument in *In re Estate of Karas* and *Labine v. Vincent, supra*, that there is "no insurmountable barrier" to the decedent writing a will. In Appellants' Brief (pp. 43-46) several points were made demonstrating that this was not a rational basis for the invidious discrimination, and Appellee's brief does not address any of these arguments. First, the potential option of the decedent is irrelevant where the state is taking affirmative discriminatory action; this is established by *Reed v. Reed*, 404 U.S. 71 (1971), invalidating gender discrimination in intestate disposition procedures. Appellee's argument and *Labine* simply cannot be reconciled with the *Reed* decision on this point.[18] Second, it is not the options of the parents that are crucial; it is the children whose rights are being violated by state action, and the children have no options available to them. *Weber v. Aetna Casualty & Surety Co., supra; Jimenez v. Weinberger, supra; Eskra v. Morton*, 524 F.2d 9, 15 (7th Cir. 1975). Their fate is determined by the interactions of the state and the father. Such a scheme is not neutral; it merely uses the state action to multiply the ways in which the illegitimate child can pay for the acts and omissions of the parents, suspending the child's rights perilously at

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[18] While the decedent in *Reed* was a minor, this was not a factor in the Court's analysis or holding. The statute was found unconstitutional as applied to all decedents, whether or not they could have left a will.

the mercy of forces beyond his or her control. Third, the fiction that all decedents know the intestacy law and, by not writing a will, silently imply that their desires accord with the statutory disposition, is stretched past the breaking point in this case.[19] Sherman Gordon was a 28-year old man of marginal economic resources who was the victim of a homicide. Appellee's attempt to give personal significance in his case to the general fictional presumed intent is unwarranted. A minority of adult Americans leave wills, and the proportion is smaller among those in Gordon's age and economic group.[20] (Appellants' Brief, pp. 45-46.) The failure to write a will is based on age, economic status, and a generalized faith (misplaced in this instance) that the state will do justice, rather than on specific knowledge of and agreement with the statutory disposition. Factors mentioned for intestacy include: procrastination; illusions of continued life, especially among young

[19] Three cases are cited at Appellee's Brief, p. 18, for the proposition that Gordon's failure to execute a will means he personally intended to leave his property according to the intestacy scheme: *Hedlund v. Miner*, 395 Ill. 217, 69 N.E.2d 862 (1946); *Belfield v. Findlay*, 389 Ill. 526, 60 N.E.2d 403 (1945); *Ickes v. Ickes*, 386 Ill. 19, 53 N.E.2d 584 (1944). In fact, all three cases are inapposite; each involved questions of interpretation of wills and presumptions that the testators knew other, unrelated, aspects of law.

[20] Testamentary disposition is increasingly de-emphasized because of the vast increase in property passing by "will substitutes," including, for the poor and moderate income groups, life insurance, employee benefit plans, and public social insurance schemes. See Langbein, *Substantial Compliance With the Wills Act*, 88 Harv.L.Rev. 489 (1975); Carroll, *The Interplay of Probate Assets and Nonprobate Assets in the Administration of a Decedent's Estate*, 25 DePaul L.Rev. 363 (1976). For those of little means, there is thus increasingly limited incentive to go through the expense of having a will written to dispose of residual property. Moreover, there may be an assumption that the state intestacy disposition accords not only with blood ties, and not only with support obligations (which will frequently pass more property than will be passed at death), but also with such insurance schemes as Social Security, thereby including illegitimate children.

adults with small estates; beliefs that legal fees for writing a will are high or that intestacy will avoid probate court and delays in distribution. Bowe & Parker, *Page on Wills*, 24-26 (1960). Knowledge of and agreement with the statutory disposition are not mentioned as a factor. Moreover, the statute here is consistently applied whether or not the father has testamentary capacity, and the state uses devices such as unfavorable tax rates (see Section II-A, *supra*) to coerce any fathers actually knowledgeable of the law to conform their actions to the mold of the intestacy statute.

Thus, to the degree that the presumed intent/no insurmountable barrier arguments attempt to place the state in the role of a passive bystander, allowing a populace of knowledgeable decedents to freely devise their property or to choose the statutory disposition, the argument pyramids unjustified fictions on top of unwarranted myths. This is particularly invidious because the fictions and myths are structured (a) to the disadvantage of a class of people against whom there has been pervasive discrimination and (b) so that the disadvantaged group itself has no control or influence over the relationship between the state-imposed fictions and the father who is theoretically capable of altering the fictions.

In *Taylor v. Louisiana*, 419 U.S. 522 (1975), this Court reversed a criminal conviction based on the unconstitutionality of a Louisiana statute which provided that a woman would not be selected for jury service unless she filed a written declaration of her desire to serve. The invalid statute was, therefore, structurally identical to the scheme here. The statute was based on state action incorporating archaic notions of the desire or intent of a gender-based group (419 U.S. at 533-537); there was concededly some adminis-

trative burden avoided by the statute (419 U.S. at 535); and, finally, there was no insurmountable barrier to women serving on the jury, since a simple written declaration would lead to inclusion, but the appellant had no control over whether or not women exercised this option. This structure was held invalid; on the last point it was noted that the selection system, while not disqualifying women *per se*, "in operation [has] conceded systematic impact . . ." and "operates to exclude . . ." 419 U.S. at 525.

In this case the resulting impact on the children is also analogous to that in *Brown v. Bd. of Education*, 347 U.S. 483, 494 (1954), another case defended on the basis of purported state neutrality:

> "To separate [these children] from others of similar age and qualifications . . . generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . . . The impact is greater when it has the sanction of law. . . ."

Here also the scheme is not neutral; it has the sanction of law and of a history of complementary laws–some only recently invalidated by the courts–which individually and in concert put the power and "moral authority" of the state between the father and his child, and which sanction and encourage the termination of their relations.

Finally, the invalidity of the "no insurmountable barrier" argument is apparent when it is realized that it could be used to shield any intestacy statute, no matter how irrational. Preferences for all male children of the decedent over all female children, or to all male relatives over all female relatives, are just as supportable under the argument as the present statute, but clearly could not survive the scrutiny applied in *Reed v. Reed, supra.* A variety of other egregious possibilities, also

perpetuating archaic stereotypes, or arising from pure arbitrary action, exist: a statute providing for the escheat of the intestate property of blacks or women or illegitimates; an inclusion of illegitimate children and exclusion of legitimate children. In each instance there would be "no insurmountable barrier" to the decedent altering the irrational state action. But the statutes could not be sustained merely because of the general escape valve or a defense that the individual decedent must have agreed with the statutory disposition or else he or she would have left a will. Rather, it is necessary to look at the state intestacy statute by its own terms, and its justifications, if any. The potential ability of the decedent to have written a will (even leaving aside the multiple restrictions, see Section II-A, *supra*) cannot be conceptualized as a rationale underlying the state's own choices. The descriptive fiction is not itself a state purpose which will serve as a shield against scrutiny of invidious and irrational discrimination.

In short, the intestacy statute is the underlying provision, and it invidiously discriminates against illegitimate children. The fact that in some circumstances there is "no insurmountable barrier" to the father partially undoing this invidious discrimination is irrelevant. As stated in analogous circumstances in *Stanley v. Illinois*, 405 U.S. 645, 647 (1972), "This Court has not, however, embraced the general proposition that a wrong may be done if it can be undone."

C. The discrimination against illegitimate children is not rationally related to any State interest in preventing spurious claims or the prompt or definitive devolution of intestate property.

The only other state interest alleged by Appellee to be furthered by the challenged classifications is that of preventing spurious claims and promoting the prompt and definitive devolution of property and the stability of land titles. (Appellee's Brief, pp. 15, 18-21) This Court has repeatedly emphasized that such concerns, while valid, may not constitutionally be used to justify the creation of a broad exclusionary "barrier that works to shield otherwise invidious discrimination." *Gomez v. Perez*, 409 U.S. 535, 538 (1973) (See Appellants' Brief, pp. 39-43) Once paternity is established pursuant to rational methods consistent with favoring entitlement, all children, legitimate or not, must be treated equally. The problems of proof connected with paternity do not justify a "blanket and conclusive exclusion. . . ." *Jimenez v. Weinberger*, 417 U.S. 628, 636 (1974).

These principles were recently reaffirmed in *Mathews v. Lucas, supra*. While the crucial Congressional purpose behind the statute at issue was "administrative convenience," 96 S.Ct. at 2764, the Court only upheld the statute because it was "carefully tuned" to such considerations. 96 S.Ct. at 2766. This was contrasted with situations, such as that present here, which, under the guise of confronting proof problems, do nothing more than "broadly discriminate between legitimates and illegitimates without more." *Lucas*, 96 S.Ct. at 2766.

Illinois has imposed a sweeping, indeed universal, rule that bars even children whose paternity has previously been adjudicated by its own courts and/or voluntarily

acknowledged. Such a scheme is simply "either counterproductive or irrationally overinclusive even with regard to this significant, nonillusory goal," and is accordingly "invalid under rational-basis standards of equal protection review." *Cleveland Board of Education v. LaFleur*, 414 U.S. 632, at 653 (1974) (Mr. Justice Powell concurring). If some sub-groups of illegitimate children present disproportionate proof problems, then the legislative remedies must "meet the cases presenting those problems without arbitrarily exterminating those which do not." *Miller v. Laird*, 349 F.Supp. 1034, 1046 (D. D.C. 1972) (three-judge court).

Both Appellee and the Illinois Supreme Court have constructed their proof arguments not around the realities of this case or analogous situations, but around proof problems in abstract cases, hypothesizing extreme situations involving collateral or distant relatives (Appellee's Brief, pp. 19-20; *Karas*, at A 48-49). This approach merely begs the question. The illegitimacy decisions rendered by this Court have made clear that there must be a reasonably careful scrutiny of the nexus between the actual proof problems and the scope and quality of the statutory exclusion. A statute which makes no attempt to approximate equivalence, but simply bars all illegitimate children, will not meet this test. Moreover, *Reed v. Reed*, 404 U.S. 71 (1971), establishes that such principles apply in the probate area as well.

The utter irrationality of the method by which Section 12 of the Probate Act purports to "prevent spurious claims" is highlighted here, where the statute excludes Deta Mona Trimble in spite of the fact that paternity was determined by court decree, prior to the death of the decedent. Whatever the general validity of the state interest in preventing spurious claims, that

interest does not justify a classification which precludes inheritance even by those who are able to submit conclusive proof of paternity.[21]

III.

THE DISCRIMINATION AMONG ILLEGITIMATE CHILDREN ON THE BASIS OF THE SEX OF THE SURVIVING PARENT HAS NO RATIONAL BASIS.

In addition to invidiously discriminating against illegitimate children, the statute discriminates without rational basis *among* illegitimate children, based on the sex of the surviving parent. (Appellants' Brief, pp.

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[21] Congress has created a national mechanism for ascertainment of paternity. Pub.L.93-647. The accompanying Senate Finance Committee report states establishing paternity may occasionally conflict with the mother's interests, but that the "child's right to support, *inheritance*, and to know who his father is deserves the higher social priority." Senate Report No. 93-1356, 1974 U.S. Code Cong. and Admin. News 8133, 8155. (Emphasis added.) The Act, *inter alia*, requires public assistance recipient mothers to cooperate in establishing the paternity of children and requires States to make paternity determination services available to all individuals, regardless of financial status. 42 U.S.C. §§602(a) (26) (B), 654 (6) (A). There is federal reimbursement of 75% of law enforcement, judicial, and other costs of this process. 42 U.S.C. §655(a), 1974 U.S. Code Cong. and Admin. News at 8153. There was a recognition that, in the ascertainment of paternity, the reliability of blood and related tests is extremely high, contrary to many popular misconceptions. Senate Report 93-1356, 1974 U.S. Code Cong. and Admin. News, at 8155-8156. See also Krause, *Illegitimacy, Law and Social Policy*, at pp. 123-128, 138. Paternity adjudication is thus considered by Congress sufficiently reliable to trigger, for child support purposes: garnishment of federal employees' salaries and waiver of certain federal privacy standards in order to locate fathers. 42 U.S.C. §§653(b), 659. Social Services Amendments of 1974, 88 Stat. 2351, §§101(a), 101(b)(1), 42 U.S.C. §§602(a)(26)(B), 651 *et seq*.

50-55) Children inherit if the mother dies; but illegitimate children–like Deta Mona Trimble–do not inherit from a decedent father. The statute, identically to that in *Weinberger v. Weisenfeld*, 420 U.S. 636, 651 (1975), therefore irrationally "discriminates among surviving children solely on the basis of the sex of the surviving parent." As a result of this discrimination, children like Deta Mona Trimble suffer a direct pecuniary loss.

Appellee misapprehends the argument made in this case by stating that the statute makes "no distinction based on the sex of the child" and attributing to Appellants an "argument that the child has been discriminated against on the basis of her sex . . ." (Appellee's Brief, pp. 27-28). Neither Appellee nor the Illinois Supreme Court in *Karas* has suggested that this discrimination among illegitimate children has any justification. The demonstration is Section II, *supra*, that there is no rational basis for the statute is equally applicable here; but the discrimination is even more pernicious because the statute is being erratically and differentially applied.

The discrimination is thus not only similar to that struck down in *Weisenfeld, supra*, but is also analogous to the differentiation of subclasses of illegitimate children invalidated in *Jimenez v. Weinberger*, 417 U.S. 628 (1974). And see *Green v. Woodard*, 40 Ohio App.2d 101, 318 N.E.2d 397 (Ohio Ct. App. 1974), invalidating a state intestacy statute excluding illegitimate children from inheriting from their fathers precisely because the distinction among illegitimate children based on the sex of the surviving parent had no rational basis.

IV.

LABINE V. VINCENT IS DISTINGUISHABLE FROM THE PRESENT CASE; IN ADDITION, *LABINE* SHOULD BE OVERRULED.

Both the Appellee and the court below rely heavily on this Court's decision in *Labine v. Vincent*, 401 U.S. 532 (1971), to support the validity of the challenged classifications. In so doing, they gloss over significant differences with the unique statute challenged in *Labine*. Moreover, they ignore repeated signals from this Court that the reasoning, if not the holding, of *Labine* has been repudiated.

A. *Labine v. Vincent* is distinguishable from the instant case in several significant aspects.

There are several distinctions between the statute at issue in *Labine* and the Illinois statute present here (see Appellants' Brief, pp. 29-30, 50-52). First, unlike Illinois law, the *Labine* statute "does not broadly discriminate between legitimates and illegimates without more." *Mathews v. Lucas*, 96 S.Ct. at 2766. While not as "carefully tuned" as the *Lucas* scheme, the Louisiana intestacy statute was inclusive of illegitimate children in three significant ways.[22] In Louisiana "natural"

[22] The cases Appellee cites (Brief, pp. 24-26) as following *Labine* also present statutory schemes which are substantially inclusive of illegitimate children. *Watts v. Veneman*, 476 F.2d 529 (D.C. Cir. 1973), involved the identical issue as that presented in *Mathews v. Lucas, supra*, and was similarly resolved against the claimants only because of the broadly inclusive nature of the statute. See Section I, *supra*. *In re Estate of Hendrix*, 326 N.Y.S.2d 646 (1971), involved a child whose paternity was neither adjudicated nor acknowledged. The Surrogates Court noted that the statute was substantially inclusive because it granted intestacy rights to children whose paternity had been adjudicated before the father's death.

children at least had preference over escheat to the state. More important, in Louisiana illegitimate children had a right to support from the estate, thereby giving them effective inheritance rights which would in some circumstances equal or exceed a distributive share. In addition, in *Labine*, the child could inherit in intestacy on terms equal to legitimate children if the father's acknowledgment stated a desire to legitimate the child. 401 U.S. at 539. These three factors presented a scheme of significant coverage of the child which has no parallel in the Illinois system of total exclusion. The *Labine* Court, moreover, emphasized that the holding related to the "circumstances presented in this case," 401 U.S. at 539, after it had earlier described the many complex and unique features of the Louisiana scheme, including the three methods of including illegitimate children mentioned above. There is a sharp contrast with Illinois, where the state *does* "broadly discriminate between legitimates and illegitimates without more." *Mathews v. Lucas, supra.*

Second, the classifications challenged here discriminate on the basis of both illegitimacy and sex, introducing an additional arbitrariness lacking in the Louisiana scheme. The *Labine* statute treated all illegitimate children alike. The Illinois statute discriminates among such children based on parental gender, since the illegitimate child can inherit from the mother but not the father. (See Section III, *supra.*) This case thus bears a closer resemblance to *Weinberger v. Weisenfeld*, 420 U.S. 636 (1974), and *Jimenez v. Weinberger*, 417 U.S. 628 (1974), than to *Labine.*

Thus, the Illinois pattern of discrimination and complete exclusion on the basis of illegitimacy and sex of the surviving parent can hardly be justified by reliance on the constitutionality of the Louisiana

scheme, which was internally consistent, and was not purely exclusionary, but rather provided substantial rights for all illegitimate children.

B. *Labine v. Vincent* should be overruled.

Even if *Labine* were not fundamentally distinguishable, it should be overruled. As has been shown, its result and rationale are basically irreconcilable with the reasoning of subsequent decisions of this Court. *Stare decisis* operates neither as an immutable command divorced from deliberate inquiry nor as "a mechanical formula of adherence to the latest decision." *Helvering v. Hallock*, 309 U.S. 106, 119 (1940). Its function is particularly limited in Constitutional cases; since the Constitution represents the ultimate authority, prior judicial decisions cannot be the sole determinant of constitutionality.

> Judicial exegesis is unavoidable with reference to an organic act like our Constitution, drawn in many particulars with purported vagueness so as to leave room for the unfolding future. But the ultimate touchstone of constitutionality is the Constitution itself and not what we have said about it. *Graves v. New York*, 306 U.S. 466, 491 (1939) (Justice Frankfurter, concurring).

As recently noted in *Edelman v. Jordan*, 415 U.S. 651, 671 (1974):

> Since we deal with a constitutional question, we are less constrained by the principle of *stare decisis* than we are in other areas of the law.[14]

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[14] In the words of Mr. Justice Brandeis: ". . . [I]n cases involving the Federal Constitution, where correction through legislative action is practically

> impossible, this court has often overruled its earlier decisions. The Court bows to the lessons of experience and the force of better reasoning . . ." *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408 (1932) (dissenting opinion).

See also *St. Joseph Stockyards Co. v. U.S.*, 298 U.S. 38, 94 (1936) (Justices Stone and Cardozo concurring).

In the same opinion cited favorably in *Edelman v. Jordan, supra*, Mr. Justice Brandeis went on to particularly limit the function of *stare decisis* in cases, such as the present one, involving equal protection issues,

> . . . where the question presented is one of applying, as distinguished from what may accurately be called interpreting, the Constitution. *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 410 (1932) (dissenting opinion).

See also *Smith v. Allwright*, 321 U.S. 649, 665 (1944). Moreover, this Court has generally regarded application of *stare decisis* as inappropriate when a prior decision stands as a "significant departure" from an otherwise consistent line of decisions. *Boys Market v. Retail Clerks Union*, 398 U.S. 235, 241 (1970).[23] From the very first, *Labine* has been considered an insupportable anomaly, criticized on its own terms and in comparison to *Levy v. Louisiana, supra*:

> An extraordinarily fine line was drawn in *Labine v. Vincent*. . . . It is true that there is a distinction

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[23] See also *Afroyim v. Rusk*, 387 U.S. 253, 255, 256 (1967), reversing a case which "has been a source of controversy and confusion ever since," and where later cases and commentators "have cast great doubt upon the soundness" of the earlier holding. *Afroyim*, overruling in 1967 *Perez v. Brownell*, 356 U.S. 44 (1958), is one of many instances in which this Court has overruled a relatively recent case. See, e.g., *National League of Cities v. Usery*, 96 S.Ct. 2465 (1976), overruling *Maryland v. Wirtz*, 392 U.S. 183 (1968); *Stone v. Powell*, 96 S.Ct. 3037, 3045 n.16 (1976), overruling rationale of *Kaufman v. United States*, 394 U.S. 217 (1969); *Smith v. Allwright*, 321 U.S. 649 (1944), overruling *Grovey v. Townsend*, 295 U.S. 45 (1935).

> between the two cases [*Levy* and *Labine*]; it is not so clear that the distinction warrants a difference in results.

Kurland, *1970 Term: Notes on the Emergence of the Burger Court*, 1971 S.Ct. Rev. 265, 312.[24]

Labine was thus not part of a long-standing doctrine or a series of similar cases.[25] In addition, this Court has subsequently isolated *Labine* and undermined the decision's authority in a series of later cases challenging discrimination against illegitimate children. In light of these subsequent decisions, *Labine* has become increasingly indefensible, has caused confusion in the lower courts, and has become subject to renewed and vigorous

[24] See also: Krause, *Illegitimacy, Law and Social Policy*, at vii-ix (1971); Pascal, *Louisiana Succession and Related Law and the Illegitimate: Thoughts Prompted by Labine v. Vincent*, 46 Tul. L.Rev. 167 (1971); Petrillo, *Labine v. Vincent, Illegitimates, Inheritance, and the Fourteenth Amendment*, 75 Dick.L.Rev. 377 (1971); Note, *Labine v. Vincent: Louisiana Denies Intestate Succession Right to Illegitimates*, 38 Brooklyn L.Rev. 428 (1971); Comment, *Constitutional Law–Equal Protection of the Laws–Inheritance by Illegitimates*, 22 Case W. Res. L.Rev. 793 (1971); Comment, *Constitutional Law–Equal Protection–Denial of Illegitimate Child's Right of Inheritance from Father Who Had Acknowledged But Not Legitimatized Heir Does Not Constitute a Violation of Child's Equal Protection Rights Under the Fourteenth Amendment*, 47 N.D. Law. 392 (1971); Comment, *Why Bastards, Wherefore Bastards*? 25 S.W. L.J. 659 (1971); Comment, *Constitutional Law–Illegitimacy–The Emasculation of Equal Protection for "Bastards,"* 3 Rut.-Cam. L.J. 316 (1971).

[25] The inconsistency of *Labine* with other illegitimacy decisions is particularly troublesome because *Labine* itself is not supported by prior case law. The entire majority opinion cited only two cases as providing support on any point. 401 U.S. at 539 n.16. The first, *Mager v. Grima*, 8 How. 490, 12 L.Ed. 1168 (1850) predated the Fourteenth Amendment and simply upheld an inheritance tax imposed on property passing to aliens. The other, *Lyeth v. Hoey*, 305 U.S. 188 (1938), concerned federal tax treatment of compromised probate claims; the Court stated as a pure factual proposition that state action establishes rights to make testamentary disposition and probate procedures, and held that the federal tax treatment of inheritances is governed by construction of the federal statute.

attack by courts and commentators.[26] Similarly, the Illinois Supreme Court decision in *In re Estate of Karas*, along with *Labine*, has already itself been criticized. Turkington, *Equal Protection of the Laws in Illinois*, 25 DePaul L. Rev. 385, at 404-409 (1976).

One of the strongest statements of the confusion and inconsistency resulting from the *Labine* anomaly is the recent Kentucky Court of Appeals decision in *Pendleton v. Pendleton*, 531 S.W.2d 507, 510-511 (1975), *appeal docketed*, 44 U.S.L.W. 3711 (May 4, 1976) (No. 75-1610), contrasting *Labine* with *Weber, supra*, and *Gomez, supra*:

> [I]t appears that here is a corner of the world Alice in Wonderland would not find unfamiliar.
>
> * * *
>
> [I]t would be our inclination to hold that although a right of inheritance may not have the immediacy or social significance of a present need for support, yet a right is a right, the existence of which surely ought not to depend on whether it falls within the ambit of state-enforced welfare legislation. If a state cannot constitutionally force a father to support his children without including illegitimate children, we can find no justification in logic for its authority to deny illegitimate children the same right of inheritance conferred upon other children. Though the right has something of a fugitive nature in that the father may of course

[26] See Krause, *The Uniform Parentage Act*, 8 Fam.L.Qtrly. 1 (1974); Wallach & Tenoso, *A Vindication of the Rights of Unmarried Mothers and Their Children: An Analysis of the Institution of Illegitimacy, Equal Protection, and the Uniform Parentage Act*, 23 Kan.L.Rev. 23 (1974); Note, *Decedents' Estates–Descent and Distribution Statutes*, 8 Ind. L.Rev. 732 (1975); Note, *Illegitimacy and Equal Protection*, 49 N.Y.U. L. Rev. 479 (1974); Note, *Illegitimate Children and Constitutional Review*, 1 Pepp. L.Rev. 266 (1974); Note, *A Question of Balance: Statutory Classifications Under the Equal Protection Clause*, 26 Stan.L.Rev. 155 (1973); Comment, *Illegitimate Intestate Succession Rights in Kentucky*, 3 N.Ky.L.Rev. 196 (1976). See also cases cited in Appellants' Brief at p. 13 n.2.

> discriminate against any child, legitimate or illegitimate, it seems incongruous that the state should be allowed to do it for him. But after all, this is mere logic. . . .

In summary, the reasoning of *Labine* has already been undermined and all that remains is the formalistic shell. *Labine* can properly be distinguished from this case and/or narrowed to the unusual Louisiana circumstances. But *Labine* can also be overruled with no negative and many beneficial consequences. Given the conflict between *Labine*'s approach and rationale on the one hand and a multiplicity of decisions on the other, and in light of the unrelenting criticism, overruling *Labine* would be perceived as harmonizing the law rather than breaking with principles of *stare decisis.*

V.

THE PROBATE ACT EXCLUSION OF ILLEGITIMATE CHILDREN FROM INHERITANCE FROM THEIR FATHERS INVIDIOUSLY DISCRIMINATES AGAINST WOMEN WITHOUT RATIONAL BASIS, IN VIOLATION OF THE FOURTEENTH AMENDMENT.

A. The discrimination against women has no rational basis.

The statute at issue discriminates against women since they are differentially burdened in carrying out obligations to their illegitimate children by the fact that the child cannot inherit from the father. (Appellants' Brief, pp. 56-61) Appellee concedes that the statute "tends to discriminate against women" (Appellee's Brief, p. 31). To justify the discrimination appellee

offers only one suggestion: since it is more difficult to prove paternity than maternity, the invidious discrimination is permissible.[27] This is merely a restatement of the argument concerning spurious claims and avoiding occasional contests, a position consistently rejected by this Court (Section II-C, *supra*). Moreover, the argument that sex discrimination in an intestacy statute can be justified to avoid occasional probate contests has been specifically rejected. *Reed v. Reed*, 404 U.S. 71 (1971).

The only proof "problems" in regard to children whose paternity has been definitively established are illusory. The statute thus ultimately rests on a perpetuation of historic discrimination against women in general, and in particular against mothers of illegitimate children, based in turn on archaic sexual stereotypes and uneven apportionment of blame. Appellants' Brief, pp. 60-61. *Cf. Weinberger v. Weisenfeld*, 420 U.S. 636 (1975); *Stanley v. Illinois*, 405 U.S. 645 (1972).

B. The issue of sex discrimination is properly presented for review.

Appellee argues that no party has standing to raise the sex discrimination issue and that the issue of discrimination against Jessie Trimble was waived by failure to raise it in the Circuit Court of Cook County. This argument is without merit.

First, the injury suffered by Jessie Trimble stems directly from and is intertwined with the injury suffered by her minor daughter. Deta Mona Trimble

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[27] The primary case relied on here by the appellee, *In re Estate of Pakarinen*, 287 Minn. 330, 178 N.W.2d 714 (1970), *appeal dismissed*, 402 U.S. 903 (1971), examined a statute substantially more inclusive of illegitimate children than that at issue here. In *Pakarinen*, acknowledged illegitimate children could inherit. Thus, unlike Illinois, Minnesota did *not* exclude all illegitimate children based on hypothetical proof problems for some children.

therefore clearly has standing to challenge the discriminatory impact of the sex-based classifications not only upon herself (see Section III, *supra*) but also upon her mother. *Stanton v. Stanton*, 421 U.S. 7 (1975); *Griswold v. Connecticut*, 381 U.S. 479 (1965); *Barrows v. Jackson*, 346 U.S. 249 (1953); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Jablon v. Secretary of HEW*, 399 F.Supp. 118, 124 (D. Md. 1975) (Three-judge court). *Cf. Weinberger v. Weisenfeld*, 420 U.S. 636 (1975).

Second, because her injury is inextricably intertwined with that of her daughter, Jessie Trimble can raise the issue of the injury to herself by means of her representative status challenging the injury to Deta. This Court has held, in a suit to vindicate support rights for the child, that objections to the technical designation of the mother's status in the litigation are unrelated to the reality of her injury and standing:

> We are satisfied that it makes no difference whether the appellant's interest in [the economic rights of her minor daughter] is regarded as personal to appellant or as that of a fiduciary.
>
> * * *
>
> Her interest in the controversy therefore, is distinct and significant and is one that assures "concrete adverseness" and proper standing on her part. *Stanton v. Stanton*, 421 U.S. 7, 11, 12 (1975).

Third, appellee relies on cases (Appellee's Brief, p. 33) which involved attempts to raise before this Court issues raised neither in the court from which the appeal was taken nor in the *certiorari* petition or jurisdictional statement to this Court. In the instant case, the issue was raised and briefed and decided in the Illinois Supreme Court (A. 47, 49-52), and was specifically set

out in the Jurisdictional Statement. The Illinois Supreme Court's consideration of the issue is, moreover, consistent with general Illinois practice, since pure issues of law, particularly those affecting the public interest, may appropriately be considered on appeal, even if the trial court has not considered such issues. *People ex rel. Baylor v. Bell Mutual Casualty Co.*, 54 Ill.2d 433, 298 N.E.2d 167 (1973); *Quitman v. Chicago Transit Authority*, 348 Ill. App. 481, 109 N.E.2d 373 (1st Dist, 1952).

Finally, under Illinois law, Jessie Trimble, as one immediately affected by the judgment of the trial court, could appeal, even if she were not a party. *Nott v. Wolf*, 18 Ill.2d 362, 163 N.E.2d 809 (1960); *People ex rel. Yohnka v. Kennedy*, 367 Iil. 236, 10 N.E.2d 806 (1937). The Motion for Direct Appeal to the Illinois Supreme Court named her separately as an appellant (A 31) and Illinois Supreme Court's acceptance of this (A 36, 55) was appropriate under Illinois law. Ill. Rev. Stat. ch. 110A, §§303(c)(4), 366(a)(2). See also *Air Line Stewards and Stewardesses Ass'n v. Quinn*, 35 Ill.2d 106, 219 N.E.2d 499 (1966); *People v. N.Y. Central R.R. Co.*, 391 Ill. 377, 63 N.E.2d 405 (1945); *National Bank of Republic v. Kaspar State Bank*, 369 Ill. 34, 15 N.E.2d 721 (1938). In addition, since none of the objections raised by appellee is of a jurisdictional nature, appellee waived such objections by failing to raise them in the Illinois Supreme Court. Ill. Rev. Stat. ch. 110A, §341(e)(7), (f); *Flynn v. Vancil*, 41 Ill.2d 236, 242 N.E.2d 237 (1968); *People ex rel. Nelson v. Olympic Hotel Bldg. Corporation*, 405 Ill. 440, 91 N.E.2d 597 (1950).

The issue of the sex discrimination against Jessie Trimble is therefore properly before this Court.

CONCLUSION

For the reasons stated, appellants respectfully request that this Court reverse the judgment of the Illinois Supreme Court, and find that: (1) The Illinois Probate Act invidiously discriminates against and among illegitimate children, thereby denying to Deta Mona Trimble the Equal Protection of the Laws as guaranteed by the Fourteenth Amendment, and (2) The Illinois Probate Act invidiously discriminates against Deta Mona Trimble and Jessie Trimble on the basis of Jessie Trimble's sex, in violation of the Fourteenth Amendment.

Respectfully submitted,

/s/James D.Weill
JAMES D. WEILL

DEVEREUX BOWLY
CHARLES LINN
Legal Assistance Foundation
of Chicago
911 South Kedzie Avenue
Chicago, Illinois 60612
(312) 638-2343

JAMES D. WEILL
JANE G. STEVENS
Legal Assistance Foundation
of Chicago
343 South Dearborn Street
Chicago, Illinois 60604
(312) 341-1070

*Attorneys for Appellants**

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*Appellants' attorneys wish to express their appreciation to Joseph Bomba, Rita Diehl, and Eileen Sweeney for their assistance in the preparation of the Appellants' briefs.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-5952

IN RE ESTATE OF SHERMAN GORDON,
Deceased,

DETA MONA TRIMBLE, and JESSIE TRIMBLE,
Appellants,

—v.—

JOSEPH ROOSEVELT GORDON, ETHEL MAE KING, WILLIAM GORDON, HELLIE MAE GORDEY, and MARY LOIS GORDON,
Appellees.

ON APPEAL FROM THE SUPREME COURT OF ILLINOIS

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, *AMICUS CURIAE*

ERIC M. LIEBERMAN
30 East 42nd Street
New York, New York 10016

NORMAN DORSEN
40 Washington Square So.
New York, New York 10012

MELVIN WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for Amicus Curiae

RECORD PRESS, INC., 95 MORTON ST., NEW YORK, N. Y. 10014—(212) 243-5775
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Interest of Amicus */

The American Civil Liberties Union is a nationwide, non-partisan organization of over 250,000 members dedicated to defending civil liberties. The ACLU has a long-standing institutional interest in protecting the constitutional rights of children, legitimate and illegitimate. Attorneys of the ACLU have appeared before this Court to argue In Re Gault, 387 U.S. 1 and Levy v. Louisiana, 391 U.S. 68. The former decision held that children involved in juvenile proceedings were entitled to a wide range of constitutional protections in such proceedings. The latter decision held that illegitimate children were entitled as a constitutional matter to pursue an action for money damages incurred by the wrongful death of their natural mother. In addition, the ACLU filed briefs amicus curiae in both Labine v. Vincent, 401 U.S. 532 and Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, each involving issues directly relevant to the ones here.

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*/ Letters of consent by counsel for the Appellants and the Appellees to the filing of this brief have been lodged with the Clerk of the Court.

The issues in this case draw into question the right of illegitimate children to inherit from their father's estate. Resolution of those issues turns on the proper application of equal protection principles and the continued validity of the ruling in Labine v. Vincent, supra. We believe that our brief will assist the Court in resolving those questions.

Statement of the Case

Appellant Deta Mona Trimble was the illegitimate daughter of Sherman Gordon, who died on May 23, 1974, leaving no will. Gordon's paternity was certified by the Circuit Court of Cook County in a suit for support brought by appellant Jessie Trimble, the mother of Deta Mona Trimble. Gordon publicly acknowledged Deta Mona Trimble as his child and supported her pursuant to the court's paternity order.

Appellant Deta Mona Trimble was barred from inheriting from her father's estate by operation of Illinois Probate Act, Section 12, which declares that illegitimate children may inherit from and through their mothers, but not from or through their fathers who die intestate. See In re Estate of Karas, 61 Ill. 2d 40 (1975), upon which the Illinois Supreme Court relied in rejecting appellants' challenge to the Illinois Act.

Questions Presented

1. Does Section 12 of the Illinois Probate Act invidiously discriminate both against and among illegitimate children, thereby denying them equal protection of the laws?

2. Should this Court's decision in Labine v. Vincent, 401 U.S. 532, be overruled?

3. Are state classifications based upon legitimacy of birth "suspect" under the Fourteenth Amendment?

4. Does Section 12 of the Illinois Probate Act invidiously discriminate on the basis of sex, in violation of the Fourteenth Amendment to the United States Constitution?

Introduction and Summary of Argument

The Court once again must consider the constitutionality of a state discrimination against children who are born out of wedlock. In a series of decisions commencing with Levy v. Louisiana, 391 U.S. 68, [1] the Court has struck down a host of such classifications pursuant to the equal protection clause of the Fourteenth Amendment, and has indicated in no uncertain terms that "a state may not invidiously discriminate against illegitimate children by denying them substantial benefits accorded children generally." Gomez v. Perez, 409 U.S. 535, 537. The sole exception to the Court's disapproval of such classifications came in Labine v. Vincent, 401 U.S. 532, which upheld Louisiana's unique inheritance statute by which unacknowledged illegitimate children had no right to inherit from either parent.

Relying entirely on Labine, the Illinois Supreme Court in the instant case upheld

1/ See Glona v. American Guarantee & Liability Ins. Co., 391 U.S. 73; Weber v. Aetna Casualty & Surety Co., 406 U.S. 164; Gomez v. Perez, 409 U.S. 532; Davis v. Richardson, 409 U.S. 1069; Griffin v. Richardson, 409 U.S. 1069; New Jersey Welfare Rights Org. v. Richardson, 411 U.S. 619; Jimenez v. Weinberger, 417 U.S. 628.

a state statutory scheme by which illegitimate children are barred absolutely from inheriting from their fathers, but not from their mothers. The Illinois Court ignored several important distinctions between the Louisiana statutory scheme at issue in Labine and the Illinois scheme in question here, especially with respect to Louisiana's effort to provide for the well-being of all children of a deceased parent by requiring support or "alimony" from the parent's estate. Perhaps even more fundamentally, the Illinois Court failed to consider the effect on Labine of the subsequent decisions of this Court striking down state classifications based upon legitimacy of birth.

The decision of the Illinois Supreme Court cannot stand. This Court could render a relatively narrow decision reversing the judgment below upon a close and studied analysis of the distinctions between the instant case and Labine. [2] Such a decision, however, would only postpone the inevitable and maintain the confused state

2/ We refer the Court to the excellent analysis in the Jurisdictional Statement and the Brief for Appellants for fuller analysis and argument on this point.

of the law viz-a-viz illegitimacy classifications upon which both courts and constitutional scholars have commented at length.3/

Amicus therefore urge the Court to reconsider the Labine holding in light of the constitutional doctrine that has evolved since that decision. We submit that such reconsideration compels the conclusion that Labine no longer is good law and should be overruled.

Concomitantly with reconsideration of Labine, the Court should decide whether classifications based upon legitimacy of birth are "suspect" for purposes of equal protection analysis under the Fourteenth Amendment, and therefore can be upheld only when they further a compelling state interest by the least restrictive means necessary to that end. See Graham v. Richardson, 403 U.S. 365; In re Griffiths, 413 U.S. 717.

3/ See, e.g., Eskra v. Morton, 380 F.Supp. 205, 214-215 (W.D. Wisc. 1974), reversed 524 F.2d 9 (7th Cir. 1975)(Stevens, J.); Norton v. Weinberger, 364 F.Supp. 1117 (D. Md. 1973), vac. and remanded, 418 U.S. 902, on remand, 390 F.Supp. 1084 (D. Md. 1975), juris. postponed to hearing on merits, ____ U.S. ____, 95 S.Ct. 2676; Lucas v. Secretary of HEW, 390 F.Supp. 1310 (D.R.I. 1975), prob. juris noted, ____U.S.____, 46 L.Ed.2d 36; Gunther, Constitutional Law (9th Ed. 1975), p. 757.

While in recent decisions the Court has discussed such classifications in terms usually reserved for "suspect" classifications, see Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 175-176; Jimenez v. Weinberger, 417 U.S. 628, 631, it heretofore has found it unnecessary to reach that question. Consideration of this issue will eliminate the confusion engendered in the state and federal courts as to the status of "illegitimacy" classifications, which confusion resulted in the erroneous decision of the court below. Analysis of the nature of such classifications will show dispositively that illegitimacy, like race and nationality and even more so than alienage, must be deemed a "suspect" classification under the Fourteenth Amendment.

Finally, irrespective of the lawfulness of its classification based on legitimacy of birth, the Illinois Probate Act, by barring illegitimate children from inheriting from their father and not from their mother, invidiously discriminates on the basis of sex and therefore is unconstitutional in two crucial respects. First, the Act imposes on the surviving mother of an illegitimate child whose father dies intestate the burden of supporting the child without assistance from the father's estate,

but imposes no similar burden on the surviving father of an illegitimate child whose mother dies intestate. Second, the Act deprives a father who dies intestate, but not a mother, of the opportunity to provide through his estate for the "care, custody and management of his or her [illegitimate] children." Stanley v. Illinois, 405 U.S. 645, 651.

ARGUMENT

I

Labine v. Vincent Should Be Overruled, Irrespective of the Suspectness of Classifications Based Upon Legitimacy of Birth.

The Court's opinion in Labine was perhaps the most unusual decision involving the equal protection clause in the modern era. It departed fundamentally from the mode of analysis applied in every other case involving a non-frivolous equal protection claim. Whatever basis there may have been for the Court's approach in

Labine at the time it was decided, subsequent doctrinal developments have undermined it entirely.

The Court is well aware of the standards of review applied in cases involving equal protection claims. In the generality of cases the "traditional" test has been applied. The standard was first stated in Gulf, Colorado & Santa Fe Ry. v. Ellis, 165 U.S. 150, 155, and was fully articulated in F. S. Royster Guano Co. v. Virginia, 253 U.S. 412:

> "But the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike."
> 253 U.S. at 415.

See also Morey v. Doud, 354 U.S. 457; Reed v. Reed, 404 U.S. 71.

In recent decisions the Court has tightened the "traditional" standard in striking down a variety of state classifications. The Court has insisted that the classification substantially further the State's interest, Reed v. Reed, supra, 404 U.S. at 75-76; Eisenstadt v. Baird, 405 U.S.

435, 446-455; James v. Strange, 407 U.S. 128, 140-141, that it further an important state interest, Weber v. Aetna Casualty & Surety Co., 406 U.S. 164, 172-176, and that the state interest be articulated, non-illusory, and not left tc be conjured by the imagination of judges. McGinnis v. Royster, 410 U.S. 263; Jiminez v. Weinberger, 417 U.S. 628; Weinberger v. Wiesenfeld, 420 U.S. 636. See Gunther, The Supreme Court 1971 Term, Foreward, In Search of Evolving Doctrine on a Changing Court: A Model for a New Equal Protection, 86 Harv. L. Rev. 1, 10-20 (1972).

A stricter standard under the equal protection clause is applied in two sets of circumstances. Where it is found either that the state classification is based upon an "inherently suspect" characteristic, or that the regulation infringes upon a "fundamental right or liberty," the presumption of constitutionality normally accorded state enactments is reversed. McKay, Political Thickets and Crazy Quilts: Reapportionment and Equal Protection, 61 Mich. L. Rev. 645, 666; 667 (1973). The statute will stand only if there "clearly appears. . . some overriding statutory purpose. . ." McLaughlin v. Florida, 379 U.S. 184, 192, or it is "necessary to promote a compelling governmental interest." Shapiro v. Thompson, 394 U.S. 618, 634. See Brown v. Board of Education, 347 U.S. 483; Harper v. Board of Elections, 383 U.S. 663, 669, 670; Williams v. Rhodes, 393 U.S. 16; Griffin v.

Illinois, 351 U.S. 12. The state must demonstrate that there are no reasonable alternative means of accomplishing the stated purpose without discriminating, Carrington v. Rash, 380 U.S. 89, and that the classification is neither impermissibly overbroad nor underinclusive. Kramer v. Union Free School District, 395 U.S. 621.

The Labine Court failed to analyze the illegitimacy classification at issue there in terms of either of the applicable standards of review. Rather, it suggested that the states' power to regulate the devolution of private property was plenary and beyond the scope or reach of the Fourteenth Amendment:

> "[T]he power to make rules to establish, protect and strengthen family life as well as to regulate the disposition of property left in Louisiana by a man dying there is committed by the Constitution of the United States and the people of Louisiana to the legislative of that State." 401 U.S. at 538.

In only one brief passage, in a footnote, did the Court even suggest that the classification might be subject to constitutional scrutiny, and the language used made clear that such scrutiny was not

applied:

> "Even if we were to apply the 'rational basis' test,...[the] statute clearly has a rational basis in view of Louisiana's interest in promoting family life and of directing the disposition of property within the State." Id. at 536 n. 6. 4/

The Court then concluded with language equating illegitimates with concubines, Id. at 538, suggesting that a state's disapproval of illegitimacy - and illegitimates - furthered its interest in maintaining standards of morality and family unity.

Both the approach and the rationale of Labine have been rejected by the Court. It now is beyond doubt that the authority of the states to regulate matters of intestacy and devolution of property must be exercised in accordance with the mandate of the Fourteenth Amendment. In Reed v. Reed, 404 U.S. 71, the Court examined an Idaho law regulating the disposition of a

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4/ We show post that the "rational basis" in the Labine footnote is neither proper nor sufficient to withstand constitutional attack.

decedent's property and found the sex-based classification at issue not to bear a "fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." 404 U.S. at 75-76. Indeed, the Reed case would seem better suited to the Labine Court's suggestion that state regulation of intestacy is plenary, because the discrimination in Reed involved the administration of estates rather than the much more important rights of inheritance per se.

The more recent decisions involving classifications based upon legitimacy also abandon suggestions in Labine that such discrimination is not a proper subject for equal protection review. Weber, Gomez, and Jimenez, in particular, manifest a continuing and deepening concern that the social stigma placed on illegitimates by segments of society not be furthered and aggravated by state laws which serve no useful purpose:

> "The status of illegitimacy has expressed through the ages society's condemnation of irresponsible liasons beyond the bonds of marriage. But visiting this condemnation on the head of an infant is illogical and unjust. Moreover, imposing disabilities on the illegitimate child is contrary to the basic concept of our system that legal burdens should bear some relationship to individual

> responsibility of wrongdoing. Obviously, no child is responsible for his birth and penalizing the illegitimate child is an ineffectual - as well as unjust - way of deterring the parent. Courts are powerless to prevent the social opprobrium suffered by these hapless children, but the Equal Protection Clause does enable us to strike down discriminatory laws relating to status of birth where - as in this case - the classification is justified by no legitimate state interest, compelling or otherwise." Weber, 406 U.S. at 175-176; see also Jimenez, 417 U.S. at 632.

Thus, Labine's failure to analyze the discrimination at issue in that case no longer can be followed. Nor can the "rational basis" suggested in footnote 6 of that opinion - i.e., that the State's interest in "promoting family life" is furthered by the classification - support the decision. While subsequent cases continue to recognize the State's interest in preserving ahd promoting family life, the Court has noted that discrimination against illegitimate children is a particularly irrational and ill-suited means to further that end:

> "We do not question the importance of that interest: what we do question is how the challenged statute will promote it ... Nor can it be thought here that persons will shun illicit relations because the offspring may not one day reap the benefits. . ." Weber, supra, 406 U.S. at 173.

See also Glona v. American Guarantee and Liability Ins. Co., 391 U.S. 73, 75. 5/

Discrimination against illegitimates commonly has been defended as furthering the state's interest in assuring the financial integrity of the "legal family unit." See Mitchell v. Mitchell, 257 A.2d 496 (D. C. App. 1969), aff'd 445 F.2d 722 (D.C. Cir. 1971); Baston v. Sears, 239 N.E. 2d 62

5/ In a survey of 2031 families in Illinois, "carefully selected to represent the whole population of Illinois," only twenty percent of those polled agreed with the following statement: "The discrimination imposed by our law on the illegitimate child is an effective way to discourage sexual intercourse between unmarried persons." Eighty percent either disagreed or had no opinion. Krause, Illegitimacy: Law and Social Policy, 161-162, 171 (1971).

(Ohio 1968). 6/ By assuring that a man's estate is not diluted by claims of illegitimate children, so the argument runs, the state guarantees that his legitimate children may fully draw upon the resources of his estate.

The circularity of this argument is apparent. The very question at issue is whether the state may discriminate between legitimate and illegitimate children in defining the family unit which may inherit a person's estate. While the interest of the state in providing for the security of the family unit is unquestioned, it may do so only in ways that do not invidiously discriminate in violation of the Fourteenth Amendment. Mere repetition of the fact that illegitimate children are not a "recognized" part of the legal family and are not now entitled to inherit is not sufficient to justify the state provision to that effect.

Moreover, the flagrant overbreadth and underinclusiveness of the illegitimacy-classifications in the Illinois intestacy statute exposes the emptiness of the claim that the discrimination involved here is

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6/ The Mitchell and Baston decisions no longer stand in light of Gomez v. Perez, supra.

meant to preserve the financial integrity of the legal family unit. The classification is overbroad in that illegitimate children of unmarried men who have no "legal family" to protect have no more right to inherit from their father through intestacy than do illegitimate children of married men who are fathers of legitimate children. If the purpose of the discriminatory classification is to insure the financial viability of the "legal family unit," only the latter group of illegitimate children should be barred from inheritance. That such is not the case exposes the vacuity of the purported "integrity of the family unit" rationale. 7/

The classification is also underinclusive. Illegitimate children of married women may inherit from their mother on an equal basis with the mother's legitimate children. If illegitimate children of married fathers are barred from inheritance to protect the integrity of the legal family unit, the same rationale should apply

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7/ The discriminatory classification at issue here is overbroad in a second way in that illegitimates may not inherit from their father even if his estate is large enough to provide fully for his legitimate family.

with respect to inheritance through mothers. 8/

The over and underinclusive nature of the classification underscores the fact that it is not related to any state interest in the financial integrity of the family. Rather, it simply and unjustifiably imposes a penalty upon the helpless children involved, furthering the already substantial stigma of illegitimacy which they bear.

8/ While at the time of Labine there might have been some warrant to the view that the Levy case turned upon a special "mother-child" relationship, cf. Baston v. Sears, 239 N.E. 2d 62 (Ohio 1968), that theory was disposed of in Weber, which upheld the right of illegitimates to recover workmen's compensation for the death or injury of their father. See also Stanley v. Illinois, 405 U.S. 645.

As we argue post, the underinclusive nature of the Illinois inheritance classification invidiously discriminates on the basis of sex, and therefore independently violates the equal protection clause. Cf., Reed v. Reed, supra.

The Labine Court sought to distinguish inheritance statutes from tort laws such as in Levy on the ground that the decedent could have written a will, and therefore that there is no insurmountable barrier to an illegitimate child inheriting. Putting aside the fact that there was no insurmountable barrier in Levy either because the illegitimate child there could have been acknowledged, the fact is that a child can do nothing to compel a parent to write a will. Once the parent dies intestate, the barrier to the child in both Louisiana and Illinois is "insurmountable."

Indeed, a major purpose of intestacy statutes is to protect the family and children of a decedent against the possibility that he or she will not leave a valid will, either through irresponsibility, lack of sophistication, or inability to find or retain legal advice. To argue that a parent of an illegitimate child can surmount the obstacle to that child's inheritance by writing a valid will is to beg the question; if a valid will is written, the problem at issue here never arises. The question is whether the state, in protecting a child's inheritance from a parent's failure to write a will, may protect only legitimate children. A response that it may do so because the illegitimate children could have been protected if only the parent had written a will is totally circular.

Finally, any reliance the Labine Court may have placed upon difficulties of proof of paternity which might delay "prompt and definitive determinations of the ownership of property" no longer can supply the basis of a decision upholding discrimination against illegitimate children. While the Court has recognized as real "the lurking problems with respect to proof of paternity," Gomez v. Perez, supra, 409 U.S. at 538, it has held repeatedly that those problems may not "... be made into an impenetrable barrier that works to shield otherwise invidious discrimination." Id. See also Weber, 406 U.S. at 174; Stanley v. Illinois, 405 U.S. 645, 656-657.

In sum, both the mode of analysis and the rationale of Labine v. Vincent have been rejected explicitly and repeatedly in subsequent decisions of this Court. Application of the principles of those subsequent decisions requires that Labine be overruled. Further, analysis of the discriminatory classification against illegitimate children at issue in the instant case compels the conclusion that it "is justified by no legitimate state interest, compelling or otherwise" and that it therefore should be struck down. Weber v. Aetna Casualty & Surety Co., supra, 406 U.S. at 176.

II

Classification Based on Status of Birth are Suspect Under the Fourteenth Amendment; Therefore, Labine v. Vincent Must be Overruled.

If the Court were to find that the holding, if not the reasoning, of Labine can withstand constitutional analysis pursuant to the "traditional" equal protection standard of review, it must then decide whether or not classifications based upon status of birth are "suspect" under the Fourteenth Amendment. 9/ Amicus submits that the question must be answered in the affirmative, and that the classification at issue here cannot withstand the strict scrutiny required under the appropriate standard of review.

In its recent decisions, the Court has strongly suggested that state discrimina-

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9/ It is clear that the Labine Court never considered the question of whether illegitimacy is a "suspect" classification, and that it never subjected the inheritance classification at issue to strict scrutiny. At the most, the Labine Court applied a watered-down rational basis standard. 401 U.S. at 538, n. 6.

tions against illegitimates are "suspect" under the Fourteenth Amendment.[10/] To the extent that the decisions rested on this analysis, they were on solid ground. For classifications most often are suspect when they rest upon a status over which an individual has no control, such as race, Brown v. Board of Education, 347 U.S. 483; ancestry or nationality, Hirabayashi v. United States, 320 U.S. 81, 100, or alienage, Graham v. Richardson, 403 U.S. 365. It is obvious that a child can no more

10/ In Weber, the Court concluded its opinion by referring to the state classification there as imposing discriminations "relating to status of birth," 406 U.S. at 175 - the classic definition of a suspect classification. Graham v. Richardson, 403 U.S. 365. See also Gomez v. Perez, supra; Jimenez v. Weinberger, supra, 417 U.S. at 632.

Indeed, at least one member of this Court has read Weber and Gomez as establishing illegitimacy as a suspect classification. San Antonio Ind. School Dist. v. Rodriguez, 411 U.S. 1, 61 (Stewart, J., concurring).

In Levy, the Court stated: "...we have been extremely sensitive when it comes to basic civil rights.... The rights asserted here involve the intimate familial relationship between a child and his mother." 391 U.S. at 71.

control his legitimacy than he can control his race or ancestry. The illegitimate child is as entitled as the black child or the Japanese-American child to treatment as an individual rather than arbitrarily as a member of a minority group to which he belongs by the fact of birth. The state should be required to meet the same standard to justify discriminatory treatment of illegitimates as it must concerning racial, national or ethnic minorities. See Gray and Rudovsky, The Court Acknowledges the Illegitimate: Levy v. Louisiana and Glona v. American Guarantee & Liability Co., 118 U. Pa. L. Rev. 1, 5-7 (1969).

The Court recently has delineated the "traditional indicia" of a suspect class in terms of society's treatment of that class:

> "[T]he class is ... saddled with disabilities or subjected to such a history of purposeful unequal treatment or relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political processes." San Antonio Ind. School District v. Rodriguez,

411 U.S. 1, 29. 11/

The history of the "purposeful unequal treatment" of illegitimates is manifest by the numerous cases this Court has had to decide in recent years involving just such discrimination. But the "disabilities" illegitimates have been subjected to go far beyond the specific details of any one case or statutory scheme. As the Court has recognized, the unequal treatment represents a "condemnation" by "society," a condemnation, however, "unjustly visit[ed] on the head of an infant." Weber, 406 U.S. at 175. And it is the unjustified stigma of inferiority which results from such condemnation that requires treatment of illegitimacy as a suspect classification. Cf. Black, The Lawfulness of the Segregation Decisions, 69 Yale L.J. 421, 424 (1960); Developments in the Law - Equal Protection, 82 Harv. L. Rev. 1065, 1127 (1969).

11/ The Court's language was reminiscent of the Carolene Products footnote in which the Court explained that there are "discrete and insular" minorities for whom heightened judicial solicitude is appropriate. U. S. v. Carolene Products Co., 304 U.S. 144, 152-153, n. 4. See Graham v. Richardson, 403 U.S. 365, 372.

In Brown v. Board of Education, the Court specifically referred to the adverse effect of a stigma of racial inferiority upon the potential for educational achievement of black school children:

> "To separate [black school children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone. . ." 347 U.S. at 494.

Similarly, in striking down a state anti-miscegenation statute in Loving v. Virginia, 388 U.S. 1, the Court held that the interests relied upon by the state to justify the classification were in themselves indicia of black inferiority:

> "[T]he state court concluded that the State's legitimate purposes were to 'preserve the racial integrity of its citizens,' and to prevent 'the corruption of blood,' 'a mongrel breed of citizens,' and 'the obliteration of racial pride,' obviously an endorsement of the doctrine of

White Supremacy." Id. at 7 (emphasis added). 12/

This Court has noted "the social opprobrium suffered by these hapless children." Weber v. Aetna Casualty & Surety Co., 406 U.S. at 175. The effect of the stigma of illegitimacy in our society has elsewhere been described as a "psychic catastrophe." 13/ Indeed, the psychological effect of the stigma of bastardy upon its victim 14/ is comparable to the damaging psychological effects upon the victims of racial discrimination.

12/ See also McLaughlin v. Florida, supra 379 U.S. at 193; Strauder v. West Virginia, 100 U.S. 303, 306-308.

13/ "In the case of illegitimate birth the child's reactions to life are bound to be completely abnormal. . . To be fatherless is hard enough, but to be fatherless with the stigma of illegitimate birth is a psychic catastrophe." Fodor, Emotional Trauma Resulting From Illegitimate Birth, 54 Archives of Neurology and Psychiatry 381 (1945).

14/ In Jenkins, An Experimental Study of the Relationship of Legitimate and Illegitimate Birth Status to School and Personal and Social Adjustment of Negro Children,

(continued on next page)

64 Am. J. Sociology 169 (1958), the author investigated whether there were significant differences in the "adjustment" of legitimate and illegitimate Negro school children. All children in the sample were recipients of Aid to Dependent Children's funds and otherwise lived in comparable economic and social circumstances. "Adjustment" was considered to be reflected in I.Q., age-grade placement, school absences, academic grades, teacher's rating, and personal and social adjustment as measured by the California test of personality. Jenkins reported that:

> Two primary patterns emerged in this study. First, the legitimate children rated higher in every area except school absences....
>
> The second discernible pattern was that the older group of illegitimate children consistently made a poorer showing than the younger group, in comparison with the legitimate children. A possible explanation for this is that, as these children grow older and are able to internalize fully the concept of illegitimacy and as they become increasingly aware of their socially inferior status, their adjustment to self and society may become progressively less satisfactory. Id. at 173.

Thus, all the ingredients requiring strict scrutiny under the Equal Protection Clause are present where state laws classify on the basis of illegitimacy. In addition, the Court has recently noted the constitutional priority of the right of a father to a full and legal relationship with his child, even when that child is illegitimate. In striking down under the Fourteenth Amendment an Illinois statutory scheme whereby an unwed father was deprived of custody of his illegitimate children without a hearing and without being given priority in subsequent adoption proceedings, the Court stated:

> "It is plain that the interest of a parent in the companionship, care, custody, and management of his or her children comes to this Court with a momentum for respect lacking when appeal is made to liberties which derive merely from shifting economic arrangements....
>
> "... Nor has the law refused to recognize those family relationships unlegitimized by a marriage ceremony." Stanley v. Illinois, 405 U.S. 645, 651.

See also Prince v. Massachusetts, 321 U.S. 158, 166; Meyer v. Nebraska, 262 U.S. 390, 399; Skinner v. Oklahoma,

316 U.S. 535. 15/

The right of an illegitimate child to a legal relationship with his or her father equal to that afforded to a legitimate child must be of the same constitutional dimension as the right of a father to such a relationship with his child.

At stake in this case is the fundamental right of all children to grow up free from disabilities imposed by the state based solely on the circumstances of their birth; the right to an equal opportunity for individual development and fulfillment free from legal sanctions that create or support economic and psychological inferiority.

15/ The statutes at issue here and in Labine deprive a father who wishes to make his estate available to his illegitimate children and thereby to provide for their subsequent "care...and management" of the opportunity to do so in at least four circumstances: (1) if the father forgets to leave a will; (2) if he is not aware that a will is necessary to protect his illegitimate children; (3) if he cannot afford to write a will; (4) if he writes a will which is found to be invalid.

III

The Illinois Probate Act Invidiously Discriminates Against Appellants on The Basis of Sex In Violation Of The Fourteenth Amendment.

The instant case is quite different from Labine in an additional and fundamental respect. The Illinois Probate Act on its face classifies on the basis of the sex of a decedent parent (and therefore as well on the basis of the sex of the surviving parent) in a manner clearly affecting the interests of both parents in providing for the care and maintenance of their families. Analysis reveals that the classification cannot withstand constitutional scrutiny by any applicable standard of review under the equal protection clause.

At the time Labine was decided, the Court had not recently addressed the question of the effect of the equal protection clause upon state classifications based on sex. Since Labine, the Court has held that such classifications, at the least, must bear a "fair and substantial relationship" to a legitimate, non-illusory and articulated state purpose. Reed v. Reed, 404 U.S. 71, 75-76; Weinberger v. Wiesenfeld, 420 U.S. 636. And at least four Justices have stated the view that classifications based upon sex are "suspect" under the

Fourteenth Amendment, thereby triggering the strict scrutiny reserved for such discrimination (see discussion ante at 23-24). Frontiero v. Richardson, 411 U.S. 677 (plurality opinion).

Amicus American Civil Liberties Union consistently has urged the Court to treat sex as a suspect classification. See, e.g., Brief for Appellant in Reed v. Reed, supra; Brief for Amicus in Frontiero v. Richardson, supra. We, of course, adhere to that view for the reasons we stated in those cases. Adoption of the strict scrutiny standard of review clearly would dispose of the sex classification at issue in the present case. But even by applying the "fair and substantial relationship" test of Reed, there can be no constitutional basis for sustaining the discrimination imposed by the Illinois Probate Act.

The Illinois Act invidiously discriminates on the basis of sex in two important respects. First, it imposes on the mother of illegitimate children whose father dies intestate the burden of providing for their support without assistance from the father's estate, whether or not the father supported those children while he was alive. No similar burden is placed upon the father of illegitimate children whose mother dies intestate. His children may inherit from their mother, thereby easing the financial strain imposed upon the father by the

mother's death.

The above discrimination is more than irrational; it is counter-productive to the state's legitimate interest in assuring that children will be adequately and properly cared for by their parents without the necessity of becoming wards of the state, economic or otherwise. As the Court has noted, it is much more difficult in our society for a single woman to attain financial security than it is for a man:

> "There can be no dispute that the financial difficulties confronting the lone woman in Florida or in any other state exceed those facing the man. Whether from overt discrimination or from the socialization process of a dominated culture, the job market is inhospitable to the woman seeking any but the lowest paying jobs." Kahn v. Shevin, 416 U.S. 351, 353.

The classification at issue here, unlike that in the Kahn case, does not cushion the impact of society's sex discrimination; rather it exacerbates it in an obvious way. If disparate treatment is warranted at all, mothers of dependent illigitimate children require greater financial protection after the death of the father than do fathers in comparable circumstances. The Illinois Act perversely

and invidiously does just the opposite. It cannot withstand constitutional attack for that reason alone.

The Illinois Act discriminates on the basis of sex in another crucial respect. We already have noted the fundamental importance of a parent's interest in providing for the "care, custody and management of his or her children." Stanley v. Illinois, 405 U.S. 645, 651. See ante at pp. 30-31. Yet the Illinois Act deprives a father who will die intestate, but not a mother, of the power to make such provision without a valid will. 16/ That distinction is utterly without rational basis. Indeed, involving as it does an interest fundamental under the Constitution, it must be measured by the strict standard of review, whether or not sex itself is a suspect classification. Cf., Shapiro v. Thompson, 394 U.S. 618. That it cannot withstand strict scrutiny follows a fortiorari.

16/ We have shown that the failure to leave a valid will often derives from such factors as lack of sophistication in legal matters, lack of financial resources, or human error, and that the intestacy laws serve the function of protecting a person's closest family from such eventualities.

CONCLUSION

For all the reasons stated, the judgment of the Illinois Supreme Court should be reversed.

Respectfully submitted,

ERIC M. LIEBERMAN
30 East 42nd Street
New York, New York 10016

NORMAN DORSEN
40 Washington Square So.
New York, New York 10012

MELVIN WULF
JOEL M. GORA
American Civil Liberties
Union Foundation
22 East 40th Street
New York, New York 10016

Attorneys for
Amicus Curiae

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